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UNIVERSITY OF ALBERTA

THE JUDICIARY AS A STATE POWER IN CANADA AND CAMEROON

BY ©

PETER ATEH-AFAC FOSSUNGU
LL.B.(Hons.), *Maîtrise en Droit*, & *Diplôme d'Études Approfondies (D.E.A.)*
(*Université de Yaoundé*: 1987, 1988, & 1989)

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of **MASTER OF LAWS**.

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....

Peter Ateh-afac Fossungu
c/o Mr. E.N. Fossungu
Sonel Limbe, P.M.B. 28
South West, Cameroon.

Edmonton, Alberta.

Date Sept. 25, 1992

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The undersigned certify that they have read, and recommended to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "The Judiciary as a State Power in Canada and Cameroon" submitted by Peter Ateh-Afac Fossungu in partial fulfilment of the requirements for the degree of Master of Laws.

Bruce P.

Professor Bruce Elman

Richard W. Bauman

Professor Richard Bauman

Ian Urquhart

Professor Ian Urquhart

Date Sept. 25, 1992

DEDICATED TO ELIAS NWEDJONG AKENDUNG AND EVERY CAMEROONIAN WHO GENUINELY CONSIDERS "QUEL CAMEROUN POUR NOS ENFANTS?"

ABSTRACT

The judiciary is the branch of state power that provides the best reflection of the society in which it operates. This thesis compares the judiciary as a state power in Canada and Cameroon. To talk of the judiciary as a state power is simply to talk about judicial independence. A judiciary without its independence can simply not be a state power. Judicial independence has, therefore, developed into one of the most sacred principles since the rise of the modern nation-state.

This thesis, while examining the importance of independence to the judiciary in the context of the two countries, specifically looks at the factors that help in securing and preserving this essential judicial attribute. It shows how formal constitutional guarantees, important as they are, are not enough if the general citizenry does not, in fact, appreciate the judiciary's political role in the society concerned.

After the Introductory Chapter, Chapter Two canvasses the status and role (constitutional and otherwise) of the judiciary. Chapter Three treats the rationale for judicial independence and examines some important factors that make this independence possible. In Chapter Four, the separation and division of powers and the entrenchment of judicial review are examined. Chapter Five looks at the methods of recruiting, of training and qualification, of remunerating, and of terminating, judicial officers.

The final Chapter is the conclusion. It is shown that Cameroon has a long way to go toward making its judiciary distinct and independent; and that it can emulate a lot in this regard from Canada.

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CHAPTER ONE

INTRODUCTION

> *Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent.*[1]

1.1.0. Importance of Independence to Judicial Role as Gravamen of Thesis

Independence is an essential attribute to the judiciary. It is so vital to the successful accomplishment of its delicate and indispensable role in society that any judiciary lacking it can simply not be a *state power*. Because of the vitality of this independence,[2] anything tending to subvert it should immediately provoke an outcry from a "lively political community, vigorous and imaginative...which watches carefully for infringements against individuals."[3] Thus, the general public and the press must support the court in resisting any subversion of its independence and impartiality. This they must do if they place any value on their own rights and freedoms; the courts alone will not withstand the pressures of the other branches. The public must know that their rights and freedoms die when judicial independence is destroyed.

The magnitude of the importance of that independence makes it the foundation of this thesis. By looking at Canada and Cameroon, this thesis will permit a critical evaluation of how best to secure and preserve judicial independence. It is only by living up to its *Oath*[4] that the judiciary, in my view, can merit being called a third branch of *state power*[5] in any society.

---

[1] Justice Louis Brandeis, quoted in "Preface" in H.C. Donahue, *The Battle to Control Broadcast News: Who Owns the First Amendment?* (Cambridge, Mass.: The MIT Press, 1989) at ix.

[2] Judicial independence is defined in Chapter Three (3.1.1.).

[3] P. Archer and L. Reay, *Freedom At Stake* (London: The Bodley Head, 1966) at 13.

1.1.1. Independence Necessary for Judicial Impartiality and Activism

The judiciary can only successfully accomplish its task if it is completely independent from government generally and the executive branch in particular. This requirement is very important. Adjudication, being "a form of *third-party* conflict resolution, the adjudicator-judge must...be genuinely a third party and not an ally or active supporter of one of the disputing parties."[6] Otherwise, the whole process will become "an open farce and difficult to sustain as a public institution."[7]

Statesmen truly dedicated to the freedom of their fellow countrymen from *unnecessary* interference by other individuals and the overwhelming state apparatus attest to this fact. For example, Sir Winston Churchill, during a debate- in the British Parliament concerning salaries of judges, stated:[8]

---

[4] That is, of the keeping of the much needed delicate and essential balance between the citizens *inter se* and between them and the state, and the guarding of the Constitution and the safeguarding of "the ultimate rights of the governed" against the tyranny of those in power. Those who complain that rules have not been observed must be able to have recourse to this judiciary for: (1) enforcement of the rules, and (2) recovery of damages, and (3) the imposition of sanctions or restraints. This thesis is more concerned with the judiciary's keeping of the balance between citizen and state than between citizens *inter se*. It is most often in the sphere of the former that we can tell whether or not the judiciary is a state power.

[5] And only then, this thesis will keep emphasizing, can such society be validly said to be "democratic". It is no democracy by simply having a "constitution" which declares, even in very strongly worded terms, that "State X is democratic, secular and social", followed by a listing of all the attributes of Heaven in what is called the "preamble"; whereas a citizen would thereafter be told by the "court" that this preamble simply has no force, whatever, of a "constitution". This issue is canvassed briefly in Chapter Three and discussed more exhaustively in Chapter Four.

[6] P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Ltd., 1987) at 20.

[7] *Ibid.*

> The principle of the complete independence of the Judiciary from the Executive is the foundation of many things in our island life. It has been largely imitated in varying degree throughout the free world. It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule. The only subordination which a judge knows in his judicial capacity is that which he owes to the existing body of legal doctrine enunciated in years past by his brethren on the bench, past and present, and upon the laws passed by Parliament which have received the Royal assent. He also- and this is *one of his most important functions considered incomprehensible in some large parts of the world- has to do justice between the citizen and the State.*

Canada and the United States take the lead in "imitating" this principle of judicial independence. Cameroon's position on the issue can be gleaned from the utterance of its statesmen. Its President, Paul Biya, for example, can only grudgingly offer this: "As a custodian of freedoms and of the security of citizens Cameroon *justice* must become a *real judicial power* vis-à-vis the executive and legislative powers."[9]

Doing justice between the individual and the state is a difficult task[10] and is what distinguishes one judiciary from another. A society which prides itself with a dependent judiciary is not democratic[11] while one with an independent judiciary is.[12] The importance of the judiciary in the administration of justice cannot be overemphasized. It is as necessary to any society as is the administration of justice, itself. The importance of the judiciary is accentuated in democratic polities. Modern democracies, no less than their pre-industrial counterparts, find courts to be indispensable[13] political institutions. Courts are also connected to channels that lead more directly to the seats of political influence: although many people do not perceive and understand it. This lack of understanding "derives in part from the fact that courts tend to play such different roles in each political system."[14]

---

[8] U.K., H.C., Parliamentary Debates, Col. 1061 (23 March 1954), quoted in A.T. Denning, *The Road to Justice* (London: Stevens and Sons, 1955) at 15. My emphasis. We will hear Queen Victoria saying the same in **3.1.1.** at note 10.

[9] P. Biya, *Communal Liberalism* (London: Macmillan, 1986) at 49. My emphasis. The appearance of "justice" before judicial "power" is well calculated. This "calculation" will be seen as we progress.

[10] The obvious result of which is the persecution of those who attempt to uphold their *Oath* or the legal profession even in some so-called "civilised societies" as France, Spain and Italy. See "Lawyers Who Risk their Lives" *The Globe and Mail* (Toronto) (October 21, 1991) A15. See also R. Brody, ed., *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers, July 1989-June 1990* (Centre for the Independence of Judges and Lawyers of the International Commission of Jurists) at 84 (Spain).

This thesis advocates and stresses that the political nature of the court be constantly brought to the attention of the public. It should be understood that the judiciary is a third powerful and indispensable component in the state, playing the role of guarding both the Constitution and the rights and freedoms of the citizenry. It is submitted that, only when the public properly understands that the judiciary is part and parcel of the political system, will it be in a position to vigorously object to any attempts to undermine its independence. This submission, constituting, as it were, the heart of the safeguard to judicial independence, is emphasized in Chapters Three and Four. Scholars and academicians, therefore, must not become co-conspirators in maintaining the "noble lie."[15] Canadians, for example, were not used to considering the courts as part of the political system.[16] After suggesting some reasons for this mode of thinking, Professor Russell attempts to dispel that fallacy by examining the extent and nature of judicial power in Canada's political system; identifying the areas of public life in which it is most influential; the ways in which it is organized and administered; and the social interests and political values it serves.[17]

---

[11] It was apt, before *Perestroika*, to cite the defunct Soviet Union as the best example of totalitarian states thereby eclipsing even worse dictatorships in Africa. However, with Gorbachev's era of drastic positive change and its accompanying wind of democracy, several of those oft-shrouded regimes collapsed. As such, the remaining few now stand exposed.

[12] See A.T. Denning, *Freedom Under the Law* (London: Stevens and Sons, 1949) at 8-9 for further discussion of this.

[13] Even totalitarian governments still recognize the indispensability of courts when they arrange trials whose outcomes are foregone conclusions: *ibid.* at 9.

[14] J.L. Waltman, "Introduction" in J.L. Waltman and K.M. Holland, eds., *The Political Role of Law Courts in Modern Democracies* (New York: St. Martin's Press, 1988), 1. See also Russell, *supra*, note 6.

As already noted above, the administration of the criminal justice, being part and parcel of civil society, can, nevertheless, quickly furnish an excuse for government terrorism and arbitrariness even in a civilised society[18] unless the principles of the Rule of Law are firmly established and jealously upheld. In a society where there is a rule of law, we have a "government under law", that is, the government and its officials are subject to the same laws as ordinary citizens. Law, in this instance, is used to promote the general interest and welfare of the public and no one is above the law. The fundamental idea is that of the supremacy of law. On the other hand, there are instances where the government stands above the law. Where this is the case, law is used to preserve the monopolistic and illegitimate interest of the ruling clique, which, by and large, always stands above that law. Where the government exercises arbitrary power, the rule of law ceases to exist. Then, we have only the supremacy of the law-giver.[19] Canada is in the first category[20] while Cameroon, with all its potentials of belonging to the first, is still mired in the second. This conveniently takes us to the choice.

---

[15] That is, by saying that courts are totally apolitical institutions, unconcerned with what goes on outside the courtroom. See Russell, *ibid*. at 4.

[16] *Ibid*. at 3.

[17] In Cameroon, on the other hand, the "noble lie" continues to be perpetuated. See C. Anyangwe, *The Magistracy and the Bar in Cameroon* (Yaoundé: PANAG-CEPER, 1989) at 25. This may, in the greater part, be responsible for the present predicament of the country's judiciary.

[18] "...in any political system, from the most systematic tyranny to the most enlightened democracy, the individual may sometimes feel himself caught up in an impersonal administrative machine. And unless he is assured *both of formal safeguards and of the sympathy of vigilant neighbours* the consequences for him may be tragic." Per Archer and Reay, *supra*, note 3 at 7. My emphasis.

1.1.2. The Choice of Canada and Cameroon

The choice is justified as follows. Canada, being *federal-parliamentary*, is unlike both the United States of America (with which it interacts more than any other country) and the United Kingdom (from which it inherited its system). Those features make Canada similar to India and Australia; but Canada is unlike them because it is *bilingual* and *bi-jural*. These two characteristics bring Cameroon into the scene. Because of these features, the two countries are often regarded as similar. Unfortunately, however, Cameroon stumbled out of gear.

---

[19] See Chief Justice B. Dickson, "The Rule of Law: Judicial Independence and the Separation of powers" (Address to The Canadian Bar Association, August 21, 1985) [Unpublished] at 2-3; F.D. Day, *Criminal Law and Society* (Springfield, Illinois: C.C. Thomas, 1964) at 11; and P.W. Rodino, "Living with the Preamble" (1990) 42 *Rutgers L. Rev.* 685 at 688.

[20] Justice Dickson, *ibid*. at 1-2.

However, it is my belief that Cameroon can extricate itself from its present predicament by emulating certain governmental structures and organs that Canada has either created or adopted in order to be where it is today. By such emulation and adaptation to its own distinctive realities, Cameroon has the potentials of becoming "an envied nation" like Canada. This is the sole aim of this thesis.

1.1.3. On the Organization of the Thesis

The thesis has six chapters including this Introductory Chapter. The province of the others are as follows.

Chapter Two will survey both the judiciary's constitutional and traditional status and role. It is common knowledge that Canadians have had to face and consider a number of profound questions about their political institutions and the values which these institutions embody. They have debated, though not completely resolved, for example, the place of French-speaking Canadians in the Canadian society in which they remain an embattled minority;[21] the Aboriginal question and gender equality- an issue which is still almost non-existent in the Cameroon context (as we will see in the course of the thesis)- being others of no less importance. In the quest for solutions to these and many other questions, important changes have had to be made in the Constitution; and these have increased the role of the courts in defining the values of the community.[22]

---

[21] The problem also exists in Cameroon with the sole differences being (1) there it is the English-speaking that constitute the "assimilated" minority; and (2) that minority group does not even enjoy self-administration (not to talk of self-government) in any state (or province) of any kind. And this was the same even in the "federal" era when the "federal" inspector claimed superiority to the "prime minister" (appointed like himself), simply because he (always a francophone) was the direct representative of the President of the "federal" *République du Cameroun*.

The situation of the judiciary in Cameroon is appallingly tragic. In this country there is "a conscious and deliberate policy of marginalising the role, eminence and importance of the judiciary".[23] This thesis, while strongly advocating a radical change in this regard, makes it clear that Cameroon is in need of a constitution which indicates "in black and white the part that judges are expected to play"[24] and which also makes them independent of, and not appended to, the executive branch of government. Above all, Cameroon needs *a lively politically conscious citizenry*. Both of these are necessary in order to make the "balance between the citizen and government [a real one], a balance which is critical to a free society."[25] The conclusion that will be drawn from Chapter Two is that the role constitutionally assigned to the judiciary, however glorious and grandiose, would be impossible to perform successfully if it were not, in reality, free from the control of the legislature and the executive.

---

[22] See J.R. Mallory, *The Structure of Canadian Government* rev. ed. (Toronto: Gage Publishing Limited, 1984) at vi. For an extensive discussion of these "constitutional minoritarian" rights and their impact, see A.C. Cairns, "Constitutional Minoritarianism in Canada" in R.L. Watts and D.M. Brown, eds., *Canada: The State of the Federation 1990* (Kingston, Ontario: Institute of Intergovernmental Relations, 1990), 71.

[23] Anyangwe, *supra*, note 17 at xii.

[24] H.W.R. Wade, *Constitutional Fundamentals* (London: Stevens and Sons, 1989) at 78.

[25] *Ibid.* at 72.

That conclusion will conveniently lead us to an examination of the rationale for that freedom in Chapter Three. While this chapter will basically justify the need for judicial independence, it will also examine some very important factors that support this independence. These "collateral factors" are, *inter alia*, public opinion, the press, and other professionals of the practising and teaching of law. The message of the Chapter is simple: (1) no one will be impartial if he or she is his or her own judge. Adjudication, as a third-party dispute resolution mechanism, requires that the adjudicator-judge be a genuine third party, not an ally or active supporter of one or the other of the disputants. Having justified the need for judicial independence, the necessity for its cautious preservation becomes imperative. (2) We will begin that task in Chapter Three by suggesting that everyone must be involved in monitoring violations of not only his or her rights and freedoms, but also those of neighbours.

In Chapter Four, the separation and division of powers and entrenchment of judicial review will be analyzed. Judicial review will be shown to be the greatest single source of the court's prestige. It has evolved through time from a power used to keep a *federal* legislature from interfering with the jurisdiction of a state or provincial legislature, to a device employed in maintaining checks and balances among governmental authorities and, further still, to a power used to protect individuals and groups from the *arbitrary* and *unreasonable* acts of the state.[26] It is widely known that constitutional litigation and judicial review were of minimal concern to judges throughout the world prior to the 1940s. It is even known to have been used only sparingly in the United States, that great land of people whose greatest goal in life is "the pursuit of happiness."[27] Today, however, with the *Charter* in Canada, this is no longer the case. The Canadian judiciary now employs review to an unprecedented degree. Its role in that regard is even surpassing that of its U.S. counterpart. It will be seen that it would be a miracle (after all that would have been discussed in the preceding Chapters) for review to exist in Cameroon. This power can only exist where the judiciary is distinct and independent. To this extent, therefore, the *Cameroon Law on the Preamble* just mentioned in the last note will hardly be surprising. Is this advocacy for power of review not tantamount to a government by the judiciary? We will attempt to explain this in Chapter Four but the full answer will come out as the Chapter cedes place to the next Chapter.

Chapter Five will look at judges' appointment, qualification, promotion, remuneration, and tenure and the like. While analysing the situation in Canada and Cameroon, some fundamental problems raised by some of them will also be canvassed. These, *inter alia*, are the dependency of judicial officials on the members of the other branches, and the controversy that the appointment of judges poses to the modern ideas of democracy and accountability. The dependency will be justified as a necessary projection of the checks and balances that we will throughout be calling for. But, again, the dangers of abuse in this regard will not be overlooked.

---

[26] See R. Coomaraswamy, "Toward an Engaged Judiciary" in N. Tiruchelvam and R. Coomaraswamy, eds., *The Role of the Judiciary in Plural Societies* (New York: St. Martin's Press, 1987), 1 at 2.

[27] A.C. Cairns, "A Tribute to Donald V. Smiley" in Watts and Brown, *supra*, note 22 at viii, alluding of course to its Constitution's preamble which, as we will learn from P.W. Rodino in Chapter Four, is (contrary to the "Cameroon Law on the Preamble") a kind of Article of Faith and an unmistakable Covenant of Trust.

Chapter Six will be the general conclusion and recommendations.

CHAPTER TWO

CONSTITUTIONAL STATUS AND ROLE OF THE JUDICIARY

> *"[Only] [a]n independent judiciary is uniquely suited to deciding cases and controversies when the other branches of government seek to shortcut th[e] constitutional process of representative democracy."*- P.R. Dimond.

2.1.0. Status and Role Intimately Bound

This Chapter will be divided into two major sections purely for purposes of manageability and simplicity. This is because the constitutional status of the judiciary, as with any other state organ or institution, cannot be safely divorced from its role. The one goes to reinforce or define the other. This pragmatic inseparability should, therefore, always be borne in mind.

A. CONSTITUTIONAL STATUS OF THE JUDICIARY

2.1.1. Status From Constitutional Treatment of Highest Court

The political and constitutional status of a country's judiciary can most often be deduced from the manner in which its Supreme Court is treated in the country's most important document, the Constitution. Part VII of the Canadian *Constitution Act, 1867*, which deals with judges of the Superior, District and County Courts, consists of six sections (sections 96 to 101). By contrast, the Cameroonian Constitution deals with the same matter in a hasty and vague manner in article 31. And, moreover, it does so in what has been described as "framed legislation"; that is to say, it leaves very important things which ought to be clearly stipulated in the Constitution for future executive (not Parliament's) legislation. We will look at the status of the supreme court of each country, beginning with the Canadian to be followed by the Cameroonian.

2.1.2. Status of the Supreme Court of Canada

Canada's original Constitution, the *Constitution Act, 1867*, did not explicitly treat the judiciary as a third and separate branch of state power. That document does not begin with articles on the legislative and executive branches, followed by the judiciary. Judicial institutions in Canada are, thus, essentially creatures of the legislature and not of the Constitution itself.[1] Section 101 of that *Constitution Act* left to Parliament (and not the executive) the option of deciding whether or not to create a "General Court of Appeal for Canada". Parliament exercised its option and in 1875 created the Supreme Court of Canada by, what Russell calls, the "quite controversial legislation" of the government of Alexander Mackenzie.[2] That did not, however, prevent the legislatively created judiciary from becoming a "power" in its own right.

One important reason for this is the fact that Canada's Constitution does not consist solely of the *Constitution Acts* of 1867 and 1982, but includes, in addition, organic statutes, constitutional conventions and judicial decisions.[3] The 1982 Constitution may be different, however. It explicitly recognizes the judiciary as a third branch of state power. It would be important to know why the Court was not as active at its inception as it is today. In other words, why was the Canadian Supreme Court very docile until relatively recently?

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[1] P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill, 1987) at 75.

[2] *Ibid*. at 335. See also P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 135. The Act of Parliament that created the court is known as the *Supreme Court Act, 1875*.

[3] Russell, *ibid*. Hogg, *ibid*. at 107. See also J.R. Mallory, *The Structure of Canadian Government* rev. ed. (Toronto: Gage Publishing Ltd., 1984) at vi; and A.F. Bayefsky, *Canada's Constitution Act 1982 and Amendments* Vol.I (Toronto: McGraw-Hill Ryerson, 1989) at 889-891.

The Court's long adolescence was due, historically, to its lack of final decision-making power in constitutional matters. This resulted in the Judicial Committee of the Privy Council (to which Canadians continued to have access) even hearing "*per saltum* appeals, which are those taken directly from the highest court of a province without prior consideration by the Supreme Court of Canada."[4] Far from bridling at being overshadowed by the Privy Council, the Supreme Court of Canada, for the most part, happily followed its lead, remaining for most of this period "a thoroughly second-rate institution and...[being] treated as such by the federal government."[5]

The long adolescence is also ascribed to a lack of appreciation of the creative legislative function of the national supreme court as part of the legal or political culture. There was only a dim recognition of the possible role such a court could play in interpreting the Constitution, this role being limited mainly to the enforcement of the division of powers between the federal and provincial authorities. There was, at the time, no conception of a supreme court enforcing a broad set of constitutional guarantees against the political branches of government as it now does. This was because, at the time, Parliamentary sovereignty, not a system of checks and balance, was the central principle in prevalent in notions of good government.[6]

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[4] C. Baar, "The Courts in Canada" in J.L. Waltman and K.M. Holland, eds., *The Political Role of Law Courts in Modern Democracies* (New York: St. Martins Press, 1988), 53.

[5] Russell, *supra*, note 1 at 337. Its Cameroonian counterpart continues to date in succumbing to third-rate treatment without, in the least, bridling at that.

The attitude of the Canadian Fathers of Confederation towards the court of last resort contrasts vividly with that of the Foumban Accord Players in Cameroon. The former did not establish a highest court of this sort at unification whereas the latter did. One would then expect that while the Canadian Supreme Court- created "*hors de la Constitution*"- would normally have been a subordinate creature (the reasons already advanced apart), the Cameroonian Court would normally be very vigorous as it was the very creation of the Constitution itself. That is not so however. But before approaching that period of Cameroonian history, it is imperative that we first distinguish between Canada's situation and what exists in Cameroon at the present.

2.1.3. Status of the Supreme Court of Cameroon

Whereas in Canada and other parts of the common law world the judiciary is a locus of political *power*, successive Cameroonian constitutions, though explicitly "creating" the court and its practices, have always considered and treated the judiciary as a mere authority. It is not even an independent "authority", but rather is:[7]

> no more than a branch of government service and all [t]hat that entails. There is a Ministry of Justice and the judiciary feels the authority of the Minister who, moreover, is part of the promoting, appointing, transferring and disciplinary process. This has

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[6] *Ibid.* at 335.

[7] C. Anyangwe, *The Magistracy and the Bar in Cameroon* (Yaoundé: PANAG-CEPER, 1989) at xii.

> predictably circumscribed the freedom of the Cameroonian judge and engendered in him an attitude of subservience and a reduced sense of vocation and profession.

At its best, therefore, the Supreme Court in Cameroon "is a frail [adjudicating] mechanism at the mercy of the government of the day".[8] Indeed, the country's judiciary has no constitutional status at all, especially in the unitary Constitution. Article 31 declares, rather laconically, that "[j]ustice shall be administered in the territory of the republic in the name of the people of Cameroon." Everything else is to "be regulated as to procedure and otherwise by law". This kind of "framed legislation,"[9] which is characteristic of an arbitrary regime, is common in Cameroon. Almost every vital subject of the constitution of the country is written in this "framed" style.[10] Although more will be said on this subject later, it is important to note that such an unusual style of legislating has left the laws of the country "in an immensely unwieldly [sic] and confused state, a mosaic, a veritable labyrinth in which even those initiated in the law can easily get lost."[11]

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[8] H.W.R. Wade, *Constitutional Fundamentals* (London: Stevens and Sons, 1980) at 3.

[9] That is to say, "enactments often contain provisions to the effect that a particular aspect of the law" (important as it may be to require immediate treatment here and now) "will be dealt with in detail by a future enactment- often a presidential decree or a ministerial order. Also, it sometimes happens that laws are so hurriedly [and secretly] drafted that no sooner have they rolled...of[f] the printing press than there are amendments." Per C. Anyangwe, *The Cameroonian Judicial System* (Yaoundé: CEPER, 1987) [hereinafter *Judicial*] at 263-264.

[10] For example, the "composition of, the taking of cognizance by, and the procedure of the Supreme Court" (art.32(2); the referendum procedure (art.30); "Parliamentary immunity, disqualification of candidates or of sitting members and the allowances and privileges of members" of the National Assembly (art.18); and elections to the institution (art.17). The same holds for the nomination of presidential candidates, supervision of such elections and proclamation of the results (art.6(3)).

[11] *Judicial*, *supra*, note 9 at 263.

Between 1961 and 1972, the judicial systems in pre-unification Southern Cameroons and the *République du Cameroun* continued to function by virtue of article 46 of the 1961 Federal Constitution. That constitution created some federal courts. Thus, judicial authority was vested in the courts of each state and the Federal Court of Justice. The latter court settled disputes (1) involving jurisdiction between courts in the different states, and (2) between the states and the federal republic. It acted both as a court of appeal and a court of administrative law.[12] There was also a Federal High Court of Justice with jurisdiction over high officials of the federation and of the states in cases of high treason or conspiracy against the security of the state (that is, the entire republic).[13] One would be tempted to say that this was some sort of a court of impeachment. This latter court was taken up *mot-à-mot* by Part VII, article 34, of the 1972 United Republic of Cameroon Constitution. But article 34(1) of the 1984 *République du Cameroun* Constitution adopts it only to a limited extent.[14]

The Federal Court of Justice, as already indicated, had the following duties: (1) to settle any conflict of jurisdiction which might have arisen between the highest courts of each federated state; (2) to give final judgment on appeals under federal law against decisions given by the higher courts of the federated states in any cases involving the application of federal law; and (3) to give judgment in disputes between any of the states and the federal republic. The composition and procedure of that Court (as well as those of any other) and the rules under which cases were to be brought before it were, as usual, to be prescribed by a federal statute.

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[12] Art. 33 of 1961 federal constitution. For a more extensive discussion of the federal courts and their compositions, *Judicial*, *ibid.* at 137-141, is instructive.

[13] Art.36 federal constitution.

[14] These three documents will henceforth be abbreviated as follows. The 1961 Federal Constitution (F.C.) is distinguished from the 1972 Unitary Constitution (U.C.) which, since 1984, is simply the *République*'s Constitution (R.C.). The centrality of the *Président de la République* in these documents simply increases with the years. Unless otherwise stated, U.C. covers the last two.

Later, we will examine the judiciary in Canada and Cameroon to determine the respective roles of their supreme courts and to see whether or not they have fulfilled their functions. Before we enter that arena, however, it is necessary to note that the "nation-building enthusiasm" which has often been used to easily hoodwink people in Cameroon quickly raises eyebrows in Canada.[15] Because of this phenomenon, it would not be surprising to find the Canadian Supreme Court, or the Federal Supreme Court, not being able to fully assume its awesome responsibility until recently. This was chiefly because of Quebeckers' concern that the new Court, with just two of its members (the number is now three) drawn from their province, was ill-suited to decide appeals concerning Quebec's civil law. They rather preferred "the erudite law lords who sat at the Judicial Committee than...the backwoods lawyers who would serve on the new court in Ottawa."[16]

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[15] See Russell, *supra*, note 1 at 336. In this regard one cannot resist sympathizing with the assertion that "Cameroonians pride themselves o[n] many things which, on the basis of existing evidence, are genuine for the most part; but if, by some remote coincidence, rationality is considered one of them, it raises an eyebrow for a people who easily consume myths." Per J.T. Ayeh, "The Political Origins of Hate Myths in Cameroon" *Cameroon Post* (2-9 May 1991), 6.

So far, we have seen that the constitutional and political status of the Canadian judiciary cannot be fully gleaned from the country's written constitution. The written constitution that may be examined for this purpose does not embody everything. Canada does not rely solely on written documental rules of guarantees and prohibitions. On the whole, the judiciary in the country is an indispensable and influential institution in the running of the state, being a power in its own right. To the contrary, though the Cameroonian Constitution expressly creates its Supreme Court, the court is not meant to have and enjoy the political and constitutional status of a third branch of state power. It is a mere arm of the executive with all that this entails.

From the foregoing compendium, coupled with the relatedness of role and status already indicated above, one should be able to prefigure the role of the judiciary in each of these countries. This issue will now be tackled.

B. ROLE OF THE JUDICIARY

2.2.0. The Judiciary's Traditional Role

Traditionally, in a tripartite structure of government, the judiciary is charged with the basic functions of adjudication or dispute settlement and of meting out the required penalty or sanctions. For example, adjudication of guilt or liability is an important function of the court. The important functions the judiciary performs in society cannot then be overemphasized.

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[16] Russell, *ibid.* Anglophone Cameroonians would seem not to even bother that the school in which judges to decide on their common law are trained "is run mainly by French professors and practitioners of law; the West Cameroon 'English' law and legal practice seem to be widely neglected. When I visited the library of that school in May, 1978, I could not find one single English book." Per P. Bringer "The Abiding Influence of English and French Criminal Law in One African Country: Some Remarks Regarding the Machinery of Criminal Justice in Cameroon" (1981) 25 *J.A.L.* No.1, 1 at 8-9. And this country, it must noted, is supposedly bi-jural and bilingual, both a law and language laboratory, in short, a model "laboratory of comparative law.": Bringer, *ibid.* at 2.

Some of these duties demand that the judge be wise, knowledgeable, and insightful, both as a jurist and as a human being. The sentencing function is just one of such duties. Sentencing is not a mechanical application of criminal code principles as is often supposed, especially in Cameroon. Sentencing is a complex and sensitive task, requiring of judges a constant weighing and balancing of the future course of the life of the individual before them with their judicial responsibility for the protection of the community.[17] Judges must, therefore, try as much as possible to bring about a proper balance between their duty to the individual and duty to society because "[i]t is indeed a grave and solemn responsibility to deprive one's fellow man of his liberty."[18]

One of the court's functions, therefore, is to protect public safety and individual human rights through criminal justice. Thus, the alienability or inalienability of rights is rightly the business of the courts. Of the many institutions of government, it is the judiciary which is centrally placed to protect the democratic rights of citizens and disadvantaged groups. The executive and legislature are said to be primarily concerned with national development on a macro-scale and are, therefore, more concerned with constructing majoritarian broad-based policies.[19] It is the judiciary which must ascertain the actual impact of these policies on the lives of individual citizens and social groups in particular situations.[20] We will examine how well the Court performs these duties in the two societies we are studying. But, before that, it is necessary to settle one important general question, which still helps in the analysis of the two countries. This question has to do with whether the judiciary's duties are purely judicial. That is to say, should it perform any other functions than those traditionally allocated to it?

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[17] See both B.J. Law in "Foreword" and W.C. Turnbladh in "Preface" in National Probation and Parole Association, *Guides for Sentencing* (New York: National Probation and Parole Association, 1957). See also C.C. Ruby, *Sentencing*, 3rd ed. (Toronto: Butterworth, 1987) at 391; *Canadian Sentencing Commission Report*, February 1987 at 132-133, 72-80; and, generally, M. Cheang, *Sentencing: A Study in the Proper Allocation of Responsibility* (Dissertation for Doctor of Jurisprudence, Osgoode Hall Law School, York University, Toronto, Ontario, Canada, September 1974).

[18] Per Judge F. Ryan Duffy, quoted in National Probation and Parole Association, *ibid.* at 29. See also M. Rosenburg, "The Qualities of Justices- Are They Strainable?" in G.R. Winters, ed., *Judicial Selection and Tenure* (Chicago: The American Judicature Society, 1973), 1 at 2.

2.2.1. Recent Developments in the Role of the Judiciary

An important current debate is whether the judiciary should limit itself to its traditional role of applying the law as made elsewhere or whether it should move out of this "cocoon" and make pronouncements which amount to law. In short, the debate is whether that branch should encroach upon the legislature's domain by way of "judicial legislation". There have been no generally satisfactory answers to this question. Philosophers, politicians, academics and lawyers have all had to say something about it. The literature, arguments and counter arguments are numerous.[21] Only a summary can be attempted in these pages. There are two primary camps, of course, in the ongoing argument. These are the judicial passivists and activists. Let us look at them in turn.

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[19] See M. Laver, *Invitation to Politics* (New York: Basil Blackwell Inc., 1984), chapters 6 and 7; and H.S. Commager, *Majority Rule and Minority Rights* (Gloucester, Mass.: Peter Smith, 1958), chapter 1.

[20] See P.R. Dimond, *The Supreme Court and Judicial Choice: The Role of Provisional Review in a Democracy* (Ann Arbor: The University of Michigan Press, 1989) at 1; & at 16 (for the quotation at the beginning of this Chapter). As to how minoritarian groups have been looking up to the Court for the survival of their constitutional rights in Canada, see A.C. Cairns, "Constitutional Minoritarianism" in R.L. Watts and D.M. Brown, eds. *Canada: The State of the Federation 1990* (Kingston, Ontario: Institute of Intergovernmental Relations, 1990), 71.

2.2.1.(a) Judicial Passivism

This camp is against any attempt by the courts to legislate in any form, their function being only to apply Parliament's laws. The great English jurist, Blackstone, is often cited by this school which insists that the courts should merely enunciate or discover the existing law.[22] Generally, all those who are in favour of unfettered Parliamentary sovereignty will belong to this camp. Two Canadian leading scholars in the field can be placed here: Professor Peter W. Hogg generally favours restraint.[23]

But even in this matter of merely enunciating or discovering the existing law, the Cameroonian judge is not entitled, even when construing any of the plethora of obscure statutes, "to make any far-fetched interpretation of the law or of justice".[24] Cameroonian judges, in addition, have no power to review legislative and executive acts so that no matter how flagrant has been violation of the law by the government or by an individual having its protection, the court cannot intervene on its own initiative by entertaining proceedings of any kind against that wrongdoer. It must wait until some particular individual in the government moves it to action.[25] And the government in Cameroon, as we shall see throughout this thesis, is synonymous with the President of the Republic (or the trilogy: head of state, head of government, supreme commander of the armed forces). Added to this list, as subsequent chapters will demonstrate, are the titles and functions of primary and *sole* law-maker and of chief justice.

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[21] For further readings, see, for example, L.L. Jaffe, *English and American Judges as Lawmakers* (Oxford: Clarendon Press, 1969); S.L. Kimball, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism* (Chicago: American Bar Association, 1985); A. Dufour, *Le Pouvoir Judiciare* (Ottawa: Canadian Bar Association, 1973); R. Neely, *How the Courts Govern America* (New Haven: Yale University Press, 1981); L.B. Boudin, *Government by Judiciary* (New York: W. Godwin, Inc., 1932); L.A. Garber, *Of Men and Not of Law: How the Courts are Usurping the Political Function* (New York: The Devlin-Adair Company, 1966); and A.T. Frantz, *How Courts Decide* (Buffalo, N.Y.: Williams S. Hein & Co., Inc., 1968), chapter 7 especially.

[22] See M.K.B. Wambali and C.M. Peter, "The Judiciary in Context: The Case of Tanzania" in N. Tiruchelvam and R. Coomaraswamy, eds., *The Role of the Judiciary in Plural Societies* (New York: St. Martin's Press, 1987), 131.

[23] See M. Gold, "Constitutional Scholarship in Canada" (1985) 23 Osgoode Hall L.J. 496 at 502. Professor W.R. Lederman is the other and appears in the next school.

The growing awareness of the need for human rights protection has focused attention squarely on the judiciary, thus making it increasingly impossible for judges to hide behind the doctrines of judicial "self-restraint" and "passive" interpretation. This is the more so because judges' decisions in the area of fundamental rights are now the subject of growing scrutiny by an international audience;[26] an audience which is now, more than ever before, interested in the need to implement social justice. This has constantly brought the prestige and legitimacy of the judiciary into question as an increasing number of citizens and citizens' groups thrust their numerous grievances directly to the portals of the Supreme Court. It is certain that judges will largely fail in their duties in this regard if their hands are tied by the prohibition against judicial adventurism. In the light of this, should judges (and do they) really legislate?

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[24] Anyangwe, *supra*, note 7 at 25.

[25] This is the mandate of art.10 U.C.

[26] R. Coomaraswamy, "Toward An Engaged Judiciary" in Tiruchelvam and Coomaraswamy, *supra*, note 22, 1. Cameroon, until very recently, had seemed to be cut off from that audience and scrutiny. **3.3.0.** and **3.3.1.(a)** will attempt explaining why.

2.2.1.(b) Judicial Activism

This other school thinks the Court should be very active in legislating, especially when there are gaps in the law or where the judges think the law in place is unjust or *ultra vires* its maker. There seem to be more people in this camp now than before. For example, Canadian Professor William R. Lederman is known to advocate radical judicial activism. Lord Denning is of the opinion that courts should be more concerned with doing justice than with simply applying the law.[27] This view is clearly inconsistent with that calling on judges to wait on Parliament. Lord Denning has particularly harsh words for judges who do this because it clearly amounts to evading their responsibility which requires them not to give effect to unjust laws. The law, Lord Denning rightly states, is not an end in itself.

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[27] See A.T. Denning, *The Road to Justice* (London: Macmillan, 1955) in particular and his other works as well. The Right Honourable Sir Kenneth Diplock says the same thing by urging judges to accept their responsibility of making laws to supplement Parliament's laws: "The Courts as Legislators" (Address to the Holdsworth Club of the University of Birmingham, 1964) [Published by the Club in 1965] at 10, 11-12.

A number of reasons compel the Courts to do this. First, law is about people's duty towards their neighbour; not their whole duty but those rules of conduct which a society will enforce by its collective powers of coercion. Whoever has power to determine what those rules of conduct shall be and what shall be the remedy for their breach is potentially a legislator. So, the Court, by the very nature of its functions, is compelled to act as a legislator.[28] It is, therefore, a legal fiction[29] for judges to pretend to be mere interpreters since no one would be so naive as to suppose that such decisions as *Rylands* v. *Fletcher*[30] or *Donoghue* v. *Stevenson*[31] did not change the law "just as much as the Law Reform (Contributory Negligence) Act, 1945."[32]

An activist judge would, therefore, be one who is aware that he or she wields enormous executive and legislative power and that these powers and discretion have to be used boldly for the promotion of constitutional values as well as to protect and preserve the human rights of minorities guaranteed by the Constitution.[33] Such a judge will appreciate that the judge's "*faute de mieux* executive powers" involve (1) powers of admission; (2) powers of scheduling cases for hearing; (3) powers to form benches or panels; (4) powers of granting "stay" *pendente lite*; (5) powers of "suggestive jurisprudence"; (6) powers of scheduling reasoned judgments and (7) powers of allowing or disallowing a review. And most of these powers may even result in a decision not to proceed to a decision.[34]

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[28] Diplock, *ibid.* at 1-2. "Whoever hath absolute authority to interpret any written or spoken law, it is he [or she] who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them." Per Justice Holmes, quoted in Coomaraswamy, *supra*, note 26 at 3.

[29] Or what Baxi aptly calls "the conspiracy of the Great Blackstonian Lie": U. Baxi, "On the Shame of Not Being an Activist: Thoughts on Judicial Activism" in Tiruchelvam and Coomaraswamy, *supra*, note 22, 168 at 169. See also A.C. Hutchinson, "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) 43 *U. of Miami L. Rev.* 541 at 541-543 & 548-551. He declares, for example, (at 541) that in an "era of purported democracy sensibilities and aspirations, the origins and legitimacy of law's lyric and rhythm are no longer accepted nor assumed; the relation between 'Law's Song,' its legal singers, and the identity of its composer increasingly are being questioned. In particular, there is a growing suspicion that lawyers are the singers *and* the composers of 'Law's Song'." The author is certainly using "lawyers" to mean judges.

[30] (1866) L.R. 1 Ex. 265, 3 H.L. 330.

[31] [1932] A.C. 562.

[32] Diplock, *supra*, note 27 at 2. See also Wambali and Peter, *supra*, note 22 at 132.

Baxi, having enumerated those powers, goes on to demonstrate how they are fraught with immense potential for good and bad use. He then concludes that, while the discussion on judicial activism has hitherto focused merely on the exercise of judicial lawmaking powers:[35]

> "activism" also has an important role to play in the exercise of judicial executive/administrative powers discussed in the preceding paragraphs. In each of the seven categories identified by us (and there indeed might be some more still to be identified) judges have the choice of exercising their powers militantly in favour of constitutional values or of behaving merely in a bureaucratic manner, looking at issues presented before them strictly as routine managerial tasks.

Baxi's latter category of judges represents the Cameroonian passivists who are clearly defined as well by the description.

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[33] Baxi, *supra*, note 29 at 172, 174.

[34] *Ibid*. at 169.

[35] *Ibid*. at 172.

It has been recognized, however, that both "activism" and "passivism" have their merits and demerits.[36] The essence of the argument between the two groups would seem to be whether the will of the society (represented by Parliament) or that of its individual members (as judges) should prevail. Put in other terms, which of the two situations constitutes a perfect jural society?

2.2.1.(c) The Need for Moderation and Flexibility

It is, indeed, wrong for both sides to assume extreme positions by asking for a "perfect jural society" because:[37]

> a perfect jural society is one in which the will of the society prevails over that of its members, in which the values of the law prevail over the practices of the culture, in which deductions from abstract rules of law prevail over inferences from the concrete facts of a situation, and in which actions to realize the purposes of the law prevail over inconsistent conditions. Yet no jural society exemplifies such "perfection", and most people would say that a society is far from perfect if it neglects individual interests in deference to the social will, if it ignores local or social customs in deference to general law, if it ignores the peculiarities of the facts of the case in deference to abstract rules, and if it ignores the conditions of life in deference to the purposes of the law. A jural society is not "perfect" if it is so planned by law that men [and women] are sacrificed. The whole and part, the desirable and the actual, the abstract and the concrete, the active and the established, must be kept in balance if the society is to serve [M]an.

In an attempt to strike the imperative balance, Randy Barnett has arrived at a convincing compromise. His conclusion is that both institutions should not be viewed as mutually exclusive.[38] The Court, as already noted, is, itself, not the harmless branch that it is often assumed to be.[39] On the other hand, the legislature and executive often encroach upon individual rights. Barnett's fresh position- neither for activism nor for passivism- is not, however, a capitulation from taking a stand in the controversy. He advocates judicial "pragmactivism" which he defines as:[40]

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[36] For a discussion of some of which, see R.E. Barnett, "Judicial Pragmactivism: A Definition" in J.A. Dorn and H.G. Manne, eds., *Economic Liberties and the Judiciary* (Fairfax, Virginia: George Mason University Press, 1987), 205 at 214, 206. See also Diplock, *supra*, note 27 at 16; and Dimond, *supra*, note 20 at 8.

[37] Q. Wright, *The Role of International Law in the Elimination of War* (Manchester: Manchester University Press, 1961) at 70.

> a system of philosophy or jurisprudence that tests the validity of a decision concerning the appropriate sphere of judges or law courts by its tendency to actively achieve a practical result or results.

Judicial pragmactivists then lie "somewhere between the extremes of judicial activism and passivism"[41], with their credo being "judicial activism in pursuit of liberty is no vice; judicial restraint in pursuit of justice is no virtue"[42] since:[43]

> judges should acquiesce to the legislature when a statute leads to the efficient outcome but should blaze new creative legal trials when a statute is inefficient.

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[38] The legislature too performs judicial functions anyway. See Russell, *supra*, note 1 at 90; and Honourable Jules Deschênes, "*Le Role Legislatif du Pouvoir Judiciare*" (Address to the Chamber of Commerce of Montréal, October 29, 1974) at 5-6.

[39] See, for example, Garber, *supra*, 21 chapter 3.

[40] *Supra*, note 36 at 207. The term is a synonym for "judicial practivism": *ibid*. at n.10.

[41] *Ibid*. at 216.

[42] *Ibid*. at 217.

[43] *Ibid*. at 208. See also Chief Justice B. Dickson, "The Rule of Law: Judicial Independence and the Separation of Powers" (Address to the Canadian Bar Association, August 21, 1985) [Unpublished] at 12.

The consequence against which judicial intervention is assessed must, therefore, be whether or not "the goal of efficiency"[44] is served by judicial intervention or by judicial deference.

What, in fact, is the situation in Canada and Cameroon? How have Courts in these countries reconciled their primary duty to protect the dignity and integrity of all citizens against the perceived needs of national security? There is a plurality of legal systems in both Canada and Cameroon. This arises from the past colonial order.[45] To what extent is the continuance of legal pluralism in these societies conceived as the means of maintaining ethnic diversity? How has the judiciary in each of these societies responded to the demands and problems of ethnic pluralism?[46]

Courts, more than any other public body, make decisions. How they go about it, though, naturally varies from country to country (or from an independent judiciary to a dependent one) and from one type of court to another. At the trial court level, is there a single judge or a panel? Is the judge full time? Is there lay participation, either as jurors or quasi-judges? At the appellate level, are there panels or does the whole court sit on each case? Is there a screening device for appeals? If panels are present, who selects the panels? Is there a chief judge, and if so what is that person's influence? What is the role of counsel or advocate? In criminal cases, what is the role of the prosecuting authorities? What role does precedent play, formally or informally? What difference is accorded trial or intermediate appellate courts? What can be said of the value of dissenting opinions? Are they kept private or made public? Do the judges' political perceptions colour their decisions? What of the influence of those outside the court: legal academics, prominent counsel, the nation's chief legal officer?[47]

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[44] This thesis proposes that "efficiency" be understood here to mean efficiency in protecting both individual liberty and collective security. Otherwise, efficiency is open to formidable criticism. See **4.1.2.** note 20, and **3.2.2.** note 27.

[45] Canada while being bi-jural (i.e., has two legal systems- common and civil law systems), is also confronted with (1) the presence of *indigenous peoples* and their claims; (2) the competing influences of many intellectual traditions, economic philosophies and interests and regional identities. See *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (1983) at 4. The emphasis in the first factor is for purposes of what is said in **3.3.2.** note 102. Cameroon, contrary to the general belief, is not bi-jural but tri-jural: "native" or customary, civil, and common, law systems. See *Judicial, supra*, note 9 generally. Canada also may become tri-jural if it adopts the separate justice system for its aboriginal (or "native") peoples, which is being constantly proposed to it. See, e.g., *Justice on Trial Vol.I, Report of the Task Force on the Criminal Justice and its Impact on the Indian and Metis People of Alberta*, March, 1991, p.1-7.

[46] See N. Tiruchelvam, "Introduction" in Tiruchelvam and Coomaraswamy, *supra*, note 22, vii at ix-xi.

We cannot possibly deal with all these questions (which, certainly, help to bring out the fundamental differences in justice administration in the two societies) in the remaining portion of this chapter; but answers to most, if not all, of these questions will become clearer as we move through the thesis. We will now continue with the role of the judiciary in both countries, beginning with Canada.

2.2.2. The Role of the Judiciary in Canada

The Supreme Court of Canada is the highest court of the land, standing at the apex of the judicial system. It is the most powerful court and is of most interest to students of politics. Its decisions are binding on all courts below. It has the last word on all areas of law: federal, provincial, and constitutional. It is primarily a court of appeal;[48] though sometimes the federal government refers questions to it directly under the reference procedure. The Court deals with disputed questions of law and not of fact. To understand the Supreme Court's role in Canada, one must:[49]

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[47] See J.L. Waltman, "Introduction" in Waltman and Holland, *supra*, note 4, 1 at 4.

> think of the country's legal system as a pyramid with a very wide base narrowing to the sharp point with the Supreme Court at the apex. Forming the base of this pyramid are the myriad situations involving the legal rights of Canadians....The court which presides at the apex cannot be expected to review all that has gone on below it.

We could indicate in a few words that the Canadian judiciary now belongs to the activist camp, with the necessary moderation just called for. Even its period of judicial self-restraint which characterized the judges' hitherto constitutional role had been:[50]

> leavened by dissenting judgments from great jurists like the late Chief Justice Laskin, who did not hesitate to point out where the law was contrary to our contemporary social values, and in the process shamed legislators into changing it.

Though "for its first seventy-five years the Supreme Court of Canada was supreme in name only",[51] the advent of the Canadian *Charter of Rights and Freedoms* in the *Constitution Act, 1982* completely revolutionized the judiciary.[52] Today, the 1928 decision in *Henrietta Muir Edwards* v. *Attorney General for Canada*[53] would be inconceivable in Canada. The women in question were told by the Court that they could not be appointed to the Canadian Senate because the constitutional provision only allowed "persons" to be so appointed. This did not authorize female appointments since common law precedent defined "person" as not including "women".[54] This would no longer be so because the Canadian judiciary now plays an important role in the development and maintenance of democratic institutions in the country, a role accentuated by Alan Cairns' "constitutional minoritarianists".[55]

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[48] See Justice Dickson, *supra*, note 43 at 21; and Baar, *supra*, note 4 at 56.

[49] Russell, *supra*, note 1 at 333. But, though that Court cannot review all that has gone on below it, it does not know *renvoi*, which seems to be the best duty of its Cameroonian counterpart as we will see below (note 63).

[50] Mallory, *supra*, note 3 at vii. Cameroon clearly lacks such great jurists partly because of (i) the insistence on an *esprit de corps* (that is, court solidarity) and (ii) the principle of deciding cases by panel, without dissenting judgments: reinforced by the "*sécret de la délibération*" rule (i.e., every judgment is the product of the collective examination by all the judges concerned). A dissenting judgment may be written but it is filed and never read in court. See Anyangwe, *supra*, note 7 at 31-32.

The *Charter* and the human rights movements have, in many ways, made the judiciary a most dynamic and important government institution. Standing between individual citizens and the wielders of power, the judiciary has become the ultimate arbiter in the arena of democratic politics. This sudden thrust on to the centre stage has made judging a difficult and complex exercise since it unmasks the exercise of judicial power- a power hitherto "masked and hidden from political scrutiny."[56] This much more positive policy-making and value-setting role of the Canadian courts is certainly one "which will strain their credibility and legitimacy much more than in the past."[57]

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[51] Russell, *supra*, note 1 at 336. We will see later, too, that to talk of its Cameroonian counterpart as supreme is a "misnomer". See *infra*: (below note 96).

[52] See Dickson, *supra*, note 43 at 16-17. These are absent in Cameroon simply because the court has shied away from boldly enforcing what is in place in the preamble. This is further elaborated on in Chapters Three and Four. But compare text to note 66 below (to effect that even without the *Charter* the Canadian court still performed "weighty responsibilities").

[53] [1930] A.C. 124.

[54] See Baar, *supra*, note 4 at 55.

[55] Cairns, *supra*, note 20. See also A.A. McLellan, "Women and the Process of Constitution-Making" in D. Schneiderman, ed., *Conversations* (Edmonton: Centre for Constitutional Studies, 1992), 9; and B. Baines, "'Consider, Sir,...On What Does Your Constitution Rest?'- Representation and Institutional Reform", *ibid.*, 54.

This is precisely why Professor Russell admonishes that the decisions of the Supreme Court be sound enough. Lawyers and government officials who have to deal at first hand with the problems of everyday life must be able to be guided by such decisions. And so, too, must the thousand of judges who handle the great mass of litigation which eventually develops in society.[58] The Canadian Supreme Court's function is essentially legislative and Russell agrees with Lord Diplock in holding that creativity in the judiciary's legislative function increases with the court's position on the pyramid. The significance of the Canadian Supreme Court's work depends very much on whether it applies its legislative energies to legal questions of fundamental importance to society.[59]

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[56] Russell, *supra*, note 1 at 4.

[57] Mallory, *supra*, note 3 at vi.

[58] Russell, *supra*, note 1 at 334. The Court's ultimate influence depends "on the independence, integrity, wisdom, and insight of its rulings in interpreting the meaning of the Constitution." Per Dimond, *supra*, note 20 at 156.

[59] Russell, *ibid*. One of such occasions was "September 28, 1981. Never before had there been such a day in the calendar of the Supreme Court of Canada. Never had the Court been drawn so firmly into the heart of a political crisis of the first order. Never had a decision been awaited with such intensity, and delivered with cameras rolling and television commentary reminiscent of an election night. Never had a Court judgment had such a critical impact on the subsequent course of the political life of the nation." Per K.G. Banting, "Foreword" in P.H. Russell et al., *The Court and the Constitution* (Kingston, Ontario: Institute of Intergovernmental Relations, 1982) at vii. Judges in Cameroon have never handed down any such judgment "even though the courts have had occasion to decide volcanic political cases" Per

While in Canada the judiciary's role in the development of the country's legal system has constantly been strengthened and encouraged, e.g, with the 1974 amendment of the *Supreme Court Act*,[60] in Cameroon the reverse is true.[61] For example, the Canadian Supreme Court (with very few exceptions) is now its own gatekeeper. It is able to select the cases it hears on the basis of their public importance. The Court has become primarily a "public law " court, its dockets dominated by issues of criminal law, the interpretation of regulatory statutes, and constitutional cases. In this regard its role in the Canadian polity has the potential of surpassing that of the U.S. Supreme Court in the American polity.[62]

There are some differences between the U.S. Court and the Canadian. First, in the U.S., state supreme courts are final courts of appeal on matters of purely state law. This is not so in Canada where the national Supreme Court is "a general court of appeal".[63] The second is that the Canadian Court acts as

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Anyangwe, *supra*, note 7 at 57. One of such regrettably lost occasions and cases is analyzed in Chapters Three and Four below.

[60] See Wade, *supra*, note 8 at 71.

[61] See Chapter One, note 23. In the country, as noted earlier, it is the president of the republic who must refer matters to the supreme court.

[62] Russell, *supra*, note 1 at 334. See also P.H. Russell, "The Supreme Court Decision: Bold Statecraft Based on Questionable Jurisprudence" in Russell et al, *supra*, note 59, 1. Compare the court's "*faute de mieux*" executive powers above in 2.2.1.(b) between notes 33 & 34.

[63] *Constitution Act, 1867*, S.101. This is the same in Cameroon except that its own Supreme Court only sends the case back, *renvoi*, to the court of appeal for a new decision. This is not the *renvoi* of private international law. It means simply "sending back" as indicated. In theory, this *renvoi* (from the French verb "*renvoyer*") "can go on *ad infinitum*...[and] explains why cases take up to *ten years* in the Supreme Court before a decision is handed down. Our Supreme Court, as I see it, is *ineffective* because...the procedure is a *clog on justice*. The crowds one sees around the Supreme Court are there to personally follow up their

umpire of the Canadian federal system, defining the powers of the two levels of government.[64] The U.S. Supreme Court, though occasionally imposing limits on the states, has abdicated to the Senate the responsibility to apply federal restrictions on Congress.[65] Third, with the *Charter of Rights and Freedoms*, the Canadian Supreme Court has become the arbiter not only of the division of powers between governments but also of the line between the powers of both levels of government and the rights and freedoms of citizens. Thus, added to the Canadian Court's already weighty responsibilities is civil liberties adjudication which has been the most prominent function of the U.S. Supreme Court since World War Two.[66]

The prominent function of the U.S. and Canadian Supreme Courts is due to the fact that Americans and Canadians cherish their rights and are relatively quick to go to court in order to redress violations of those rights.[67] A more influential and active judiciary (than it was before 1949 in Canada) is necessitated by the pre-occupation with the assertion and maintenance of rights which is characteristic of the American and Canadian political thoughts and

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case files." Per Nyo' Wakai, "Former Judge Nyo' Wakai Talks to Le Messager on the Judicial System in Cameroon" *Le Messager* (6 June 1991), 18-19 at 18. My emphasis.

[64] As we saw earlier, this *might* also have been the case in Cameroon before 1972 with the Federal Court of Justice (text to notes 12 & 14 above).

[65] Russell, *supra*, note 1 at 335. See also *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985) 471 U.S. 1049.

[66] Russell, *ibid*.

[67] K.M. Holland, "The Courts in the United States" in Waltman and Holland, *supra*, note 4, 6 at 8.

cultures.

If the Supreme Court of Canada was a "captive court" until 1949, it was because it was contented to be so and not because its independence and impartiality, as a judiciary, were absent. It was principally because the Canadian legal establishment was in awe of the English Bench and bar.[68] At least, Canadian conservative judges could have all the reason to be so. They participated in the Privy Council themselves- a system of justice administration they were used to. The opposition from Quebeckers, as noted above, is also an important factor. Has it been the same with the Supreme Court of Cameroon? In other words, if the Cameroonian Supreme Court is not only "captive" but mangled and caged, with its "hands chained at the back- ineffective"[69], is it because the members of that court want it to be that way? We will now find out.

2.2.3. The Role of the Judiciary in Cameroon

The Cameroonian Supreme Court, whose composition, structure and jurisdiction, as has been described above, were to be established by subsequent law, has the following constitutional duties to perform. It gives final judgment on (1) such appeals as may be granted by law from the final judgments of Courts of Appeal and lower courts; (2) enforceable court decisions whenever the application of the law is in issue; (3) complaints against administrative acts, whether claiming damages or on grounds of *ultra vires*; and (4) disputes which the law expressly refers to it.[70] The "disputes" expressly referred to that court concern the ascertainment of the President of the Republic's permanent incapacity to attend to *his*[71] duties;[72] any law which the president himself "considers to be contrary to this Constitution" "under the conditions prescribed by the law provided for in Article 32."[73] The said article 32 we have already seen.[74] Finally, the court has to decide on any doubt or dispute on the admissibility of a bill or amendment.[75] It is only important to note here that on all these matters, that is to say, where the "Supreme Court is called upon to give an opinion in the cases contemplated by Articles 7, 10 and 27, its numbers[[76]] shall be *doubled* by the addition of personalities nominated for one year by the *President of the Republic* in view of their *special knowledge or experience*."[77] This is an excellent means of incapacitating the Court so that it might not be able to stand up against executive lawlessness. More on judicial review of constitutionality is in Chapters Three and Four.

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[68] Russell, *supra*, note 1 at 336.

[69] Judge Nyo' Wakai, *supra*, note 63 at 19.

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[70] Article 32(1) U.C. (being *Law No. 75-1 of May 1975*). Note that it is the President himself who must make such reference (see text to note 25 above) and that what is referred to as "law" in Cameroon is, in effect, a presidential decree as seen in **2.1.3**. We will further elucidate on this in **3.3.0.**

[71] It is certain that, constitutionally in Cameroon, a woman can never be president. "....*He* shall define the policy of the Nation" (art.5(2)); "The President of the Republic shall be elected for five years by universal suffrage. *He* may be reelected [how many times?]. *His* election requires..." (art.7(1)) etc. But just how the permanently incapacitated president is to effect the normal reference, only God knows.

[72] Art.7(2) U.C. This raises the same problems that Wade canvasses concerning the impracticability of having entrenched rights in the British system, with its "dogma of Parliamentary sovereignty": *supra*, note 8 at 22. In similar manner, in Cameroon, one president's acts or laws cannot bind his successor. Both these features- as exist in Britain and Cameroon- are absent in Canada.

[73] *Ibid*. Art.10. So, if the next president "considers" the former's laws contrary to his own constitution (and laws), that ends the matter: and no court can say otherwise, especially as he alone "shall define the policy of the nation". This article 5 is the same as Art.8 F.C. It has already been adequately pointed out that this type of drafting, done "by the cronies of the executive called *Administrateur Civil*," and "investing powers ...[in] one man can only be seen in a dictatorial regime where the legislature is the puppet of the executive." Per Barrister C.N. Etinge, "Proposition for an Agenda of a National Conference" *Le Messager*, *supra*, note 63, 6-7 at 6. The learned Barrister rightly submits that it is not the president who ought to define the policy of the nation. On the contrary, it is "the constitution, the Supreme document of the land, the sentinel of all freedoms and liberties, *which is drawn and agreed upon by the people*." *Ibid*. My emphasis. Also see section 14 of the Nigerian Constitution by which "sovereignty belongs to the people of Nigeria from whom government through this Constitution derives its powers and authority". Barrister Etinge crowns his brilliant argument by indicating that "[i]f the president is invested with that power" (as he is in Cameroon) "then fifty Presidents will define fifty policies for a nation." *Ibid*. This is axiomatic. Had the Canadian or American Constitutions, for example, been drafted in that manner, then John A. Macdonald (for the former) and George Washington (for the latter) would have "defined" their respective country's policies: with their numerous successors having the same opportunities of defining and redefining; which, in effect, simply means amending and re-amending the documents. This would mean, especially in the United States where there is a "term of office" (there is none in Canada), that the country would certainly not be what it is today: after no less than seventy presidents. For, would some "mad" president not have defined the policy to be the demise of the Union as Mikhail Gorbachev has done to the defunct Soviet Union? *Son Excellence* El Hadj Ahmadou Ahidjo did just that in Cameroon in 1972.

Apart from the expressly stated constitutional duties just enumerated, the courts in Cameroon are expected to (1) render justice impartially; (2) guarantee rights and freedoms of the individual citizens and organs; (3) settle disputes and (4) prevent crime by identifying offenders so that they may be punished.[78] Dr. Anyangwe thinks the fourth role "is a slight shift from the traditional role often assigned to judges"[79] but, nevertheless, maintains that this:[80]

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[74] *Supra*, note 70.

[75] Art.27 U.C.

[76] Which, in the first place, are [is] not specific: it is made up of "the Chief Justice of the court, Bench President*s* [How many benches are there?], Substantive and Alternate Puisne Judge*s*, the Attorney General of the court, an Advocate General, Deput*ies* to the Procureur General, a Registrar-in-Chief and Registrar*s*": *Judicial*, *supra*, note 9 at 168-169. What is the actual number then to be doubled?

[77] Art.33 U.C. My emphasis. How special are the knowledge and experience to be to satisfy the requirement? That is solely at the appointer's exclusive discretion.

[78] Anyangwe, *supra*, note 7 at 22, 23, quoting the president's definition (and remember always that he is, indeed, the only one to "define the policy of the nation") of the role of the courts. Also note that his definition surpasses anything in the "framed" constitution.

> "new" role does not mean that the judiciary would have to usurp the functions of the police [because] [i]t is simply another way of saying the judiciary should be as much concerned as the executive with the preservation of law and order in society.

With all deference, this thesis differs on that interpretation of the "new" role. The courts are just as concerned with the preservation of law and order in societies such as Canada where that "new" role is not necessarily stated.[81] And preserving law and order in such societies includes putting a firm stop to governmental lawlessness as well.[82] When that "new" role is explicitly enumerated in Cameroon, it amounts, in my view, simply to this. It is intended to put the *magistrat* or judge on his or her guard by making it crystal clear to him or her that whenever the government accuses or even merely suspects anyone *you* must convict him or her without any much ado.[83] This interpretation I have just proffered is corroborated by a number of factors. The first has to do with the fact that security officers (police and gendarmerie) spy on judges[84], while the second is the fact that a prosecutor of the morning easily (and legally too) becomes a judge in the afternoon and by evening he or she is the administrator of a gaol.[85] The third, to give just three, is the fact that the Cameroon Penal Code[86] leaves the judge with no room for discretion or fine distinctions. And where a judge is even bold enough to try this he or she becomes liable to a term of imprisonment or fine.[87] A judge (or any legal or other judicial officer) is liable to detention for up to five years if he or she "issues any order or prohibition to any executive or administrative authority."[88]

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[79] *Ibid.* at 22.

[80] *Ibid.*

[81] See 2.2.0. and 2.2.2.

[82] See Russell, *supra*, note 1 at 3.

[83] Thus, President Julius Nyerere of Tanzania, too, could state (concerning courts which acquit accused persons): "We have a problem on what to do with these people. However, we have not yet decided on the course of action....I ask the magistrates to forgive us if we hesitate to take culprits to courts of law. At times racketeers have been taken to courts where they either receive light sentences or have been set free..."- quoted in Wambali and Peter, *supra*, note 22 at 139-140.

In this situation one wonders what to make of the President's definition of the judiciary's role in guaranteeing the individual citizen's or organ's rights and freedoms. How can there possibly be justice in such a system? How would the Court be settling disputes between, for example, the legislature and executive if it can *never* issue an order against the latter? Does prevention of crime expressly exclude "executive crime"? The whole arrangement simply makes a mockery of justice administration.

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[84] See Anyangwe, *supra*, note 7 at 47.

[85] See *ibid*. at 3, 42. See also Chief B. Etahoben, "Mrs. Ebai Beats the Crisis Challenge, Quits Bench for Private Practice" *Cameroon Post* (31 July-7 August 1990), 4.

[86] That notorious document of oppression which must have, as Book I, "general principles" which ordain just what the judge must do in every case. Compare **2.2.1.(a)**.

[87] *Cameroon Penal Code* section 125(a).

[88] *Ibid*. s.126(b)

No legislature, it has been held,[89] would consciously withhold funds for equipment and staff without which a court simply could not operate. Would the legislature in Canada deny funds necessary to house the court and pay the salaries of the court's clerks, stenographers, and bailiffs? Would it withhold fees to juries and expert witnesses? Would it reject any reasonable request for funds required in the process of determining guilt or innocence? This would certainly be an outrageous thing to think of in Canada.[90]

These possibilities are, however, perfectly normal in Cameroon, where the judiciary depends not on Parliament but on the legal department (or *le procureur général*) for funds. This arrangement is well calculated since, as "the Procureur controls the purse, he is made to appear stronger than and superior to the judge."[91] For, though the former theoretically cannot go as far as giving the latter instructions, "he can make things nasty and difficult for the judge, for example, by deliberately delaying in meeting the judge's request for funds."[92] Dr. Anyangwe even gives examples of "unscrupulous Procureurs" who have blackmailed judges in this way to obtain decisions to their liking.

We may further appreciate the difference between the two countries by comparing the situation in Cameroon before and after the demise of the much vaunted federation (1961-1972). This we will do through some answers former Supreme Court Judge Nyo' Wakai[93] gave in June 1991 in response to *Le Messager*'s questions on the judicial system in Cameroon:[94]

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[89] See National Probation and Parole Association, *supra*, note 17 at 11.

[90] Though Justice Dickson still has worries that it is the Minister of Justice, rather than the Chief Justice, who still controls and defends the judicial budget: *supra*, note 43 at 19.

[91] Anyangwe, *supra*, note 7 at 44.

[92] *Ibid.* at 45.

> **Le Messager:** You worked in former West Cameroon and knew the judicial system. How can you compare what obtained in West Cameroon in those days and what is prevailing today?
> **Judge Nyo' Wakai:** There is certainly a difference between what obtained in West Cameroon before the constitutional changes of 1972 which ushered in the United Republic of Cameroon....West Cameroon inherited the British judicial system with all its trappings. The judiciary in West Cameroon enjoyed a considerable independence even though justice was on the exclusive federal list; but the sensitivities of the times were such that any interference in this area would have met with serious political consequences. The people had faith in the judiciary because they believed that the court was the institution with undisputed authority where everyone whatever his [or her] station in life could complain against any violation of his [or her] rights and was sure of getting untainted justice. I have referred to the trappings of independence or power of the judiciary. These trappings ensure respect of those who administer justice and by those to whom justice was administered. For example, the head of the judiciary was well honoured and lodged as the head of a *power* in a palace. One of the shocks I had when I got to Yaoundé for the first time was the fact that the President of the Supreme Court in the person of Mr. NGUINI was living in a tumble-over house while boys who had just graduated from ENAM[[95]] and appointed Ministers were living in palaces. Mr.NGUINI endured his ordeal until a few years to his retirement. Even then the supposed new lodge allocated to him had been vacated by a junior Minister for being sub-standard. Nobody bothered about the personal security of President NGUINI whereas in West Cameroon, all High Court Judges were provided with Orderlies and State Counsel going on

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[93] "[O]ne of Cameroon's ablest and finest judges": *ibid.* at xv.

[94] See *supra*, note 63 at 18. My emphasis and notes. Capitals as in original.

[95] This is the National School of Administration and Magistracy where, as alluded to earlier (note 16), both Cameroon's *administrateur civil* and *magistrat* are trained. There is no law school; there is only the unique *Faculté de Droit et des Sciences Economiques* at the unique *Université de Yaoundé*.

assizes had a Police Constable assigned to them. Also the protocol position of the Magistrates or Judges left no doubt in anyone's mind that they represented a *power*. The ceremonies, especially at Assizes, were marked with pomp and pageantry in which the population participated. As the country advanced, the degeneration began. I recall the disgraceful way the Federal Inspector of Administration in West Cameroon stopped the mounting of a guard of honour at Assizes. *This signalled the demise of the judiciary in West Cameroon*. The heads of the other branches of government had the oath of office administered to them by the head of the judiciary thus bearing witness to the *supremacy of the law*. Today, a politician swears-in his colleague while the judiciary looks on as if to say, never mind, we shall run the affairs our own way, i.e., the political way.[[96]] Today the judiciary is treated as any civil service department, vying for promotions and appointments for which they have got to lobby the politicians- in a word, the judiciary has become embroiled in appointment politicking. It is a *mangled judiciary*. Its judgments are neither respected nor enforced. That summarises my opinion of the judiciary in Cameroon. Something must be done and done quickly otherwise it cannot withstand the onslaught of multi-party politics.
Le Messager: As a former member of the Supreme Court, can you comment on the functioning of that Court? Has the Supreme Court been performing its functions?
Judge Nyo' Wakai: To describe the Supreme Court in Cameroon as a Supreme Court is, in my experience and opinion, a *misnomer*. In Cameroon, people acquainted with the anglo-saxon judicial system see the Supreme Court of Cameroon as a court of final jurisdiction whereas his [sic] counterpart who is acquainted with civil law or more precisely the Napoleonic Code system knows it to be nothing but a *cour de cassation*. That means a court which has as its main function, to point out errors committed by the Courts of Appeal or other inferior courts...[and] *send[] the matter back to another court, or the same court differently composed*, for rectification of the error and determination of the matter. This is generally referred to as *renvoi*.... Those who have an experience of how the Cameroonian system works, will realise that it is like what one sees around the Ministries of Public Service and Finance. A rabble! Sometimes, a Judge is embarrassed to have a litigant burst into his chambers to reveal that he [or she] has reliably

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[96] See *Judicial*, *supra*, note 9 at 142 to the same effect on oath administration by politicians *inter se*.

> learnt that the former is dealing with his [or her] matter.[[97]] All this [is] because there is no proper security in or around the court. From what I have said, you may conclude for yourself whether or not the Supreme Court of Cameroon is performing its functions.

2.2.4. Concluding Remarks

That says almost everything. But we need to reiterate the following. (1) That the Supreme Court is vested with the awesome responsibility of judicial review. This responsibility would not be discharged in a spirit of diffidence or self-restraint. The judiciary, to be able to play its role of preventing abuse and correcting injustice and discrimination, must liberate itself from modes of thought that shackle the legal imagination of judges and lawyers. Renewed commitment to the social improvement of the deprived and dispossessed segments of society, who have hitherto been marginalized by the legal system, is required.

(2) This demand on the judiciary is especially challenging in the developing world as the court there often finds that it has moral responsibility without the necessary safeguards of institutional integrity.[98] But the time may be ripe for the development of a fresh, innovative, and principled approach to the judiciary's role in a changing society. Every substantial change in society "calls

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[97] And still worse is the fact that by section 30 of *Law No.75/16 of December 8, 1975* judges of that court are challenged and sued by parties appearing before them. See *Judicial, ibid.* at 175.

[98] Coomaraswamy, *supra*, note 26 at 1.

for a reexamination of existing values in their application to new situations."[99] This is certainly even more pressing in polyethnic and multicultural societies that Canada and Cameroon are.

(3) Canada succeeds in this matter because it is growing increasingly rights-conscious and is now powered by an unprecedented urge, from the various segments of its population, to preserve cultural distinctiveness and establish gender equality. But it would seem that these are just some of those vital areas regarding which Cameroonians are not "rational".[100] For example, instead of coming out in their masses to give the judges[101] a push and helping hand in arrogating judicial independence, they would rather be aloof, grumble in hiding, and expect the judiciary to "do the miracle"[102] all by itself. The Cameroonian public fails to appreciate that the judiciary alone cannot do this and, consequently, will simply not live up to its purpose (however glorious and grandiose) if it is not is independent. In the next chapter, therefore, while we will be justifying that independence, we will also evaluate the contribution of the general citizenry to securing and preserving it.

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[99] J. Stone, *Visions of World Order: Between State Power and Human Justice* (Baltimore: The John Hopkins University Press, 1984) at 72. See to similar effect Mallory, *supra*, note 3 at vii.

[100] See *supra*, notes 15, 16, 71, & 76; the third note being read in combination with 1.1.3. text around note 21.

[101] They, like almost everyone else in the country, only complaint about the system when they are no longer having its "benefits" and cannot, therefore, go without rebuke for the sorry state of the country's judiciary.

[102] This miracle is especially aggravated for Cameroon by two factors: (1) Even the legislature is not free, and (2) the perception the country's majority French-speaking population has of the Supreme Court.

CHAPTER THREE

RATIONALE FOR JUDICIAL INDEPENDENCE

> "*Those who would give up essential liberty, [and constant vigilance] to purchase a little temporary safety, deserve neither liberty nor safety.*"- Benjamin Franklin.

3.1.0. Introduction

The purpose of this chapter is to demonstrate the need for judicial independence. It also examines some very important factors that make such independence possible. These factors will be termed "collateral". They are, *inter alia*, public opinion, the press, and other professionals practising and teaching law.

After a brief discussion of the concept of judicial independence in the first section, the second looks at the situation in Canada, including the role played by these collateral factors in promoting judicial independence. In the third section, we will examine judicial independence in Cameroon and how the collateral factors contribute to the situation of the country's judiciary. We will then probe into the official defender of judicial independence in the two countries in the fourth section. In the fifth section, some recommendations are examined and suggestions made.

3.1.1. The Concept of Judicial Independence

(a) On its Importance: The judiciary is one of the three branches of government of the modern state- the executive and legislature being the other two. As we saw in Chapter Two, the adjudication of cases, interpretation of the

law, and checking abuse of power are among the judiciary's principal functions. We also saw in Chapter One that in order to be able to satisfactorily and efficiently carry out these functions, the judiciary must be independent of the other branches of state government, especially the executive. Because of these requirements, judicial independence:[1]

> has developed into one of the most sacred principles since the rise of the modern nation-state, [this principle evolving]...together with that [of the] rule of law and the Supremacy of Parliament.

(b) On its Definition: By judicial independence in this thesis we mean:[2]

> the quality which assures that judicial opinions will be based upon the facts and the law of the land regardless of fear or favor from outside influences.

Essentially, these influences often emanate from individuals, from pressure groups, and especially from the government of the day. Such independence requires, at the minimum, that the judiciary be free from the influence of the other branches of government.[3] One of the chief virtues of a judge is *impartiality*. Impartiality, as we have seen in previous Chapters, cannot truly exist if judges are interested parties. Thus, in the Berger affair[4], limitations were placed on the "off-the-bench" political activities of judges so that the independence of the judiciary would be preserved, or at least be seen to be preserved. Secondly, if the judiciary's prestige and role must be respected and sustained by a politically active citizenry (such as Canada's), judges ought not to participate openly in partisan politics. This may well explain why Cameroon's President cautions the judges:[5]

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[1] M.B.K. Wambali and C.M. Peter, "The Judiciary in Context: The Case of Tanzania" in N. Tiruchelvam and R. Coomaraswamy, eds. *The Role of the Judiciary in Plural Societies* (New York: St. Martin's Press, 1987), 131.

[2] E.B. Stason, "Judicial Selection Around the World" in G.R. Winters, ed., *Judicial Selection and Tenure* rev. ed. (Chicago: American Judicature Society, 1973), 45 at 46.

[3] P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 139.

[4] *Canadian Judicial Council, Re: Mr Justice Thomas Berger*, report submitted to the Honourable Jean Chrétien, Minister of Justice (Ottawa: Canadian Judicial Council, 31 May 1982).

> The *material guarantee* of the independence *granted* to [you] the judicial corps must have as its spiritual counterpart an absolute neutrality and objectivity...freely accepted by each of its members. There can be no impartiality in a judge without this neutrality in the independence of his functions.

(c) On the Need for Independence: Peter Russell defines adjudication as "a form of *third-party* conflict resolution". The phrase, "third-party" in this definition is of enormous significance. It requires that the adjudicator be a genuine "third-party and not an ally or active supporter of one [or the other] of the disputing parties"[6] The umpire ought to be completely detached from and disinterested in the litigation if its judgment is to be accepted by both disputants as not only fair but also legitimate. This is because a process of adjudication:[7]

> which involves judges making decisions on the basis of their assessment of the competing submissions of the parties would be

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[5] See "*Rentrée solennelle de la cour suprême*", *Cameroon Tribune* No.1024 (17 November 1977) at 4, translated and quoted in C. Anyangwe, *The Magistracy and the Bar in Cameroon* (Yaoundé: CEPER, 1989) at 24. My emphasis. By "material guarantee", the President is here certainly referring to their salary and tenure which, as we will see in Chapter Five, are far from the point (of being materially guaranteed).

[6] P.H. Russell, *The Judiciary in Canada: Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 20.

[7] *Ibid*. See also 1.1.1.

> an open farce and difficult to sustain as a public institution if judges were openly aligned with particular disputants.

One problem with this issue of judicial independence is that most, if not all, Third World governments shrink from or panic at the mere mention of "judicial independence". This is because governments in these countries always see judicial independence as a threat to their rights[8] in favour of the people's liberties and rights. Judicial independence need not necessarily be viewed in this way in a society worthy of the description "open" or "democratic".[9] Thus, we hear Queen Victoria declare:[10]

> The independence and learning of the judges supported by the integrity of other members of the profession of the law are the chief security for the rights of the Crown and the liberties of the people.

These words apply to Canada as well, without modification. To apply them to Cameroon, as well as the United States, we must substitute "country" for "Crown" as Stason himself points out.

Winston Churchill, in 1954, said:[11]

> The British Judiciary with its traditions and record, is one of the greatest living assets of our race and people and the independence of the Judiciary is a part of our message to the ever-growing world around us.

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[8] Which is true to the extent that they arrogate to themselves "rights" which are properly not theirs.

[9] That is, one with a "government under law" as seen in 1.1.1.

[10] Quoted in Stason, *supra*, note 2 at 45.

[11] House of Commons Debates, March 23, 1954, col. 1063, quoted in A.T. Denning, *The Road to Justice* (London: Stevens & Sons Ltd., 1955) at 15. See also 1.1.1. at note 8 *et seq*.

But it is regrettable, indeed, that while some sections of that "ever-growing world" paid attention to that "message", others took it to be nothing other than an "empty slogan", preferring instead the "nation-building enthusiasm" counter-preached elsewhere. Canada is of the first while Cameroon champions the second.

3.2.0. Judicial Independence in Canada

Section 11(d) of the *Canadian Charter of Rights and Freedoms* gives any person charged with an offence the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent and impartial tribunal*".[12] This explicit guarantee, no doubt, applies only to courts which try criminal cases, but, as we will see later, judicial independence,[13] though not explicitly enunciated in Canada's Constitution, is so deeply established in the country that it would be impossible to dispute its importance.

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[12] My emphasis. See *Re Charles Currie* v. *The Nicaraguan Escarpment Commission* (1984) 46 O.R. (2d) 484, which held (per Justice Ewaschuk of the Ontario High Court) that an accused person is deprived of this right when tried by a justice of the peace, because such justices did not have the independence required by the Constitution. The Court of Appeal ruled later (in view of the hurried changes effected after Justice Ewaschuk's ruling) that it did not violate the *Charter*: *Reference re Justice of the Peace Act and R.* v. *Currie* (1984) 48 O.R. (2d) 609. Nevertheless, Russell sees the case as another instance (the others being *Valente* v. *R.* [1985] 2 S.C.R. 673, and *The Queen* v. *Beauregard* [1986] 2 S.C.R. 56) "of members of the judiciary turning to their own arena to obtain improvements in their conditions of office which they had not been able to obtain by making direct representations to the government.": *supra*, note 6 at 160. These Canadian justices vividly contrast with their Cameroonian counterparts who will not even attempt using such devices. See 2.2.2. note 59.

[13] Chief Justice Brian Dickson identifies five legal sources which combine to provide strong constitutional foundation for judicial independence and separation in Canada. These are: the preamble of the *Constitution Act, 1867*; section 129 of the Constitution, which continued the pre-confederation courts; section 96; the federal nature of the country; and the *Charter* (sections 24 & 52 in particular). See B. Dickson, "The Rule of Law: Judicial Independence and the Separation of Powers" (Address to the Canadian Bar Association, August 21, 1985) [Unpublished] at 6-7. These factors and many more are discussed as the thesis progresses.

Security of tenure is an important feature of judicial independence. It is expressly provided for in Canada's *Constitution Act, 1867*.[14] Judicial independence has, since the *Act of Settlement, 1701*, become:[15]

> such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.

Formal constitutional guarantees,[16] however, are not the end of the matter in Canada. Conventions, as we have seen in Chapter Two, play a particularly important part in regulating the relationships among the different branches of government. This is because Canada's Constitution draws heavily from the British constitutional tradition where:[17]

> the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion.

These elements in the quotation constitute, what has been aptly termed, a country's "legal" or "political" culture.[18] A discussion of these collateral factors- with the addition of the popular press- will now follow. They will be examined in this order: legal profession and academia; public opinion; and the press.

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[14] The provision in question is section 99 which makes judges of the superior courts "virtually irremovable". See Russell, *supra*, note 6 at 75. The section and most of the other factors in the preceding note are discussed in more detail in Chapter Five.

[15] Hogg, *supra*, note 3 at 139. Hogg, however, records the ambiguity of the section's language. Does it imply, he asks, that removal by joint address should be due to bad behaviour, or bad behaviour *per se* entitles the government to remove without the need for joint parliamentary address? Hogg favours the former interpretation. Removal is one of the subjects of Chapter Five.

[16] As already indicated, the Judicature sections (96-100) of Canada's *Constitution Act, 1867* and the cases on those sections, as well as on the *Charter*, will be examined in the appropriate portions of Chapters Four and Five which are devoted to formal constitutional guarantees.

[17] S.A. de Smith, *Constitutional and Administrative Law*, 2nd ed. (Harmsworth: Penguin Books, 1973), 365-66, n.35, quoted in Russell, *supra*, note 6 at 75. We will see later in this Chapter (3.3.1.(b)) and in the next Chapter that Cameroon's constitution draws heavily from the French.

3.2.1. The Role of the Legal Profession and Academia in Canada

Since Canada heavily relies on the Bar and legal academia[19] for recruitment to the Bench, their role toward judicial independence cannot be overemphasized.[20] This role guards against their potential dependence as well as their possible incompetence. This is better understood if the country's recruitment, promotion, education, tenure and termination of judges are examined.[21]

3.2.2. The Role of Public Opinion in Canada

Legal culture has been defined as a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected, and taught.[22] A distinction should be drawn between mass and elite legal cultures. This is because, at the mass level, legal culture interacts with the general political culture, usually in a supportive way.[23] As we will see in Chapter Four, Canadians now vigorously insist on the separation of the judiciary from the other branches of government. They are also very active in monitoring any encroachment to the judiciary's independence.

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[18] For Canadian legal culture generally, see J.R. Mallory, *The Structure of Canadian Government* (Toronto: Gage Publications, 1984) at 4-5; and Russell, *ibid.* at 35-39.

[19] These, in Cameroon, have, generally, tended to take a disappointingly elusive and escapist stand on issues in which they are, normally, supposed to shed more light than most other groups of society. See later (**3.3.1.(b)**).

[20] See, e.g., Justice Dickson, *supra*, note 13 at 16-18.

[21] As to all of which, see Chapter Five.

The political culture of a society, on the other hand, simply signifies the distinctive attitudes and approaches of a people toward politics, as these attributes have been shaped by historical traditions, demography and geographical circumstances;[24] and, certainly, "[t]here have been no 'categorical imperatives'[[25]] in the Canadian political tradition...[being] a reflection upon Canada's evolutionary path to nationhood"[26]. U.S. legal culture is known for the high values it places on judicial independence and on public opinion as a means of insuring the neutrality of the judiciary. The survival of the judiciary as a co-equal partner in government depends upon popular support. Most of the research in this regard has focused on the United States Supreme Court, with surveys of public opinion revealing strong support of that Court as the legitimate arbiter and principal bulwark of liberty, equality and justice as enshrined in the Constitution. A noticeable decline in specific support for many of that Court's constitutional decisions since the 1960s has been recorded. The decline is attributable, in part, to what some authors have held to be a "fragmentation of power" which becomes, as a consequence, "a barrier to the enactment of policies serving the public interest".[27] Thus, Archer and

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[22] J.H. Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969) at 2, quoted in J.L. Waltman, "Introduction" in J.L. Waltman and K.M. Holland, eds., *The Political Role of Law Courts in Modern Democracies* (New York: St. Martin's Press, 1988), 1 at 3.

[23] Waltman, *ibid*. He shows how mass perceptions of the nature of law and the general expectations citizens have of the law and legal actors are of major importance; whereas for the legal elites who are socialized into certain habits and approaches, the legal tradition is of paramount importance only because it makes the philosophy of law they share the starting point for any analysis of the legal system. We will note below (**3.3.1.(a)**) how members of the Cameroonian legal profession only think of legality, constitutionality, and human rights when their proper interests are in question.

[24] M. Tucker, *Canadian Foreign Policy: Contemporary Issues and Themes* (Toronto: McGraw-Hill Ryerson Ltd., 1980) at 2. See also *Law and Learning* (**2.2.1.(c)** note 45).

[25] Unlike in Cameroon, where the people have been saddled with "*l'Unité Nationale*", "*l'interêt supérieur de l'État*" and many more of such *empty* phrases whose only purpose, as we have seen and will continue seeing, is to aid one person concentrate and monopolize power. It should be noted that "[i]f the State is held to be an absolute entity, and the repository and first source of all authority, power, right and privilege, its acts will be deemed to be above judgment; its final purpose will be posited as its own selfish interest- as race was for German Nazism, as Nation was for Italian Fascism, and as Economic Community...[was] for Russian Communism." Per F.D. Day, *The Criminal Law and Society* (Springfield, Illinois: Charles C. Thomas Publishers, 1964) at 32. See also **3.1.1.** note 8. But "[i]f the State is held to be an instrument in the service of man, invested with authority and power by the people, and a safeguard of the rights of its people; its acts may be judged in accordance with law; and its final purpose will be posited as the good of the people- the Common Good." Per Germann, Day, & Gallati, *Introduction to Law*

Enforcement (1963) at 18, quoted in Day, *ibid*. Compare 1.1.1. between notes 18 & 19.

[26] Tucker, *supra*, note 24 at 8. Also see Mallory, *supra*, note 18 at 2. Canada and the United States share many things in common, especially in their respect for the rule of law and citizens' rights and freedoms. The violence in Cameroon before and long after "nationhood" has been accounted for as follows. France took and still takes independence to mean just a change of dressing: replacing colonialism (or French High Commissioner) with neo-colonialism (or Ahidjo, now Biya). France, in fact, never intended leaving Cameroon, and this was just what the *Union des Populations du Cameroun* (UPC) stood for-independence and nothing short of it. Neo-colonialism being inconsistent with such brand of independence, France had to do everything to outlaw this nationalist party before staging its independence farce in 1960. That party, then, began its terrorist acts. See, e.g., D.E. Gardinier, *Cameroon: United Nation Challenge to French Policy* (London: Oxford University Press, 1963) at 3-5.

[27] K.M. Holland, "The Courts in the United States" in Waltman and Holland, *supra*, note 22, 6 at 7, 9-10. See Chapter Five of this thesis for President Roosevelt's attempt to pack that court in his endeavour to overcome its relentless blockade to his New Deal economic recovery programmes; and H.S. Commager, *Majority Rule and Minority Rights* (Gloucester, Mass.: Peter Smith, 1958), chapter 2, for Thomas Jefferson's tireless insistence that the executive also has the right to pass upon the constitutionality of the acts of the other branches. For the case of the Canadian Court to a similar (conservative) effect, see Carl Baar, "The Courts in Canada" in Waltman and Holland, *ibid*., 53 at 73. There would seem to be a ready-made answer to such accusation against the Court: "This...inevitably means a curtailment of the officials' discretion. It will mean technicality and red tape. And it will encourage the excuse: 'I would like to help you, but there is nothing I can do'. The disadvantage of technicalities is that they restrict power to

Reay do remind us that in situations of human rights violation unless an individual is assured of both formal safeguards and the sympathy of vigilant neighbours, the consequences for him or her may be tragic.[28] These vigilant neighbours include the press.

3.2.3. The Role of the Press in Canada

Press is used here to embrace the print news media, the radio, and television. Fundamental human rights and liberties can only be preserved in a society where the judiciary enjoys freedom from political interference and pressure. People's rights also require that lawyers be free to take up all cases, even unpopular ones, without fear of reprisal.[29] Formal separation of powers in the Constitution coupled with an oblique mention of judicial independence is just not enough. The people must be aware of this and join with the press to aid the lawyers, magistrates and judges in the fight to resist any encroachment upon this independence.

The Canadian press is free and, thus, guards against possible judicial dependence and partiality in the country. It also acts as a check on the judiciary's abuse of its enormous powers. This can be deduced from Justice

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distinguish between situations. But that is their function. For the most honest official may sometimes exercise discretion unfairly or for irrelevant reasons." Per P. Archer and L. Reay, *Freedom at Stake* (London: Stevens and Sons, 1949) at 9. This quotation accords with the rationale of separation of powers in **4.1.2.** note 20.

[28] *Ibid.* at 7 (see **1.1.1.** note 18). As we will see below (**3.3.2.**), it is, indeed, tragic in Cameroon.

[29] Former Chief Justice of India, P.N. Bhagwati, "Preface" in R. Brody, ed., *Attacks on Justice: The Harassment and persecution of Judges and Lawyers July 1989-June 1990* (Geneva: Centre for the Independence of Judges and Lawyers of the International Commission of Jurists) at 3. Compare note 2 above.

Anderson's statement in *R.* v. *Frederick*:[30]

> In a country and in an era in which freedom of the press is jealously guarded and promoted and where anything deemed to be newsworthy is sure to be reported in the press, on the radio and on television, it must be anticipated and taken as the norm that any but the most commonplace homicide (if such there be) will receive publicity....

What is the situation like in Cameroon?

3.3.0. Judicial Independence in Cameroon

We will take a cursory look at both the constitutional guarantees of judicial independence in, and the political culture of, Cameroon before examining the role of the collateral factors.

Unlike Canada, Cameroon has no *Charter of Rights and Freedoms* as such. A proposal by the Canadian Bar Association and the Cameroonian Bar Council in 1989[31] has been treated as if it never existed. Principles similar to those embodied in the Canadian *Charter*, are catalogued in the preamble of the Cameroonian Constitution. The preamble, for example, states:[32]

> *Le Peuple camerounais...[a]ffirme son attachment aux libertés fondamentales inscrites dans la Déclaration universelle des droits*

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[30] (1978), 41 C.C.C. (2d) 532 at 537 (Ont.H.C.).

[31] See *The Canadian Bar Association and the Cameroon Bar Council Committee Report: Model Human Rights Charter for Developing Countries 1989* (Ottawa: Canadian Bar Association, 1989) [hereinafter CBA/CBC Report]. The treatment this proposal received renders incomprehensible the desire of Cameroon's President, as far back as 1986, for "[t]he institution of a National Charter of Freedoms, a strong State effectively govern by the people and a development administration [which] could perfectly meet the requirements for our people's onward march." Per P. Biya, *Communal Liberalism* (London: Macmillan, 1986) at 41-42.

[32] *Translation*: "Cameroon affirms its attachment to the fundamental liberties of the Universal Declaration of Human Rights and, in particular, the inviolability of private correspondence: except in cases decreed by *judicial authority*." My emphasis.

> *de l'homme et la Charte des Nations unies et notamment aux principes suivants:....Le secret de toute correspondence est inviolable. Il ne peut y être porté atteinte qu'en vertu de décisions émanant de l'autorité judiciare.*

It is important to note that this constitution, unlike Canada's, does not indicate whether the type of judicial authority is to be independent and impartial or not. The answer which may be obvious from Chapter Two is that this judiciary is anything but independent and impartial. It would, therefore, seem that when the President of Cameroon says all that has been stated above,[33] he has only the judiciary's duty of doing justice between citizen and citizen in mind. But it has already been indicated that one of that institution's most important functions is that of doing justice between the citizen and the state; that is, preventing government terrorism and abuse of power. As noted in Chapter Two, however, the Cameroonian court must never censure the government.[34]

The monitoring of the constitutionality of laws is essential to every society that is, or claims to be, democratic. But after its study of the constitutional system of Cameroon, the CBA/CBC Committee was led "to conclude that in that State there is no form of control over the constitutionality of laws such as exists in Canada and other countries."[35] Without such control by an independent judiciary, the very principle of respect for human rights[36] is barely conceivable.

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[33] *Supra*, note 5.

[34] See 2.2.3. notes 80 to 88. All these arguments about the preamble may be merely for academic discourse because, in the present Cameroon, it would not even matter whether that portion of the constitution under discussion becomes (even as we are still discussing): *"l'autorité judiciare indépendente et impartialle"*. This is because the country's judges (as we will see below (3.3.1.(b)) and in Chapter Four) will still tell us that the preamble is of no force and effect. This objectionable interpretation of the constitution fails to take cognizance of the fact that stability is provided when there is no utopianism in the constitution and the law. When its presence in the constitution and law raises hopes and expectations which cannot be fulfilled, the result is factionalism. See J.J. Kirkpatrick, "Sources of Stability in the American Tradition" in J.J. Kirkpatrick, ed., *Dictatorships and Double Standards- Rationalism and Reason in Politics* (New York: Simon and Schuster, 1982), as discussed in "Books Received" (1983) 15 N.Y.U.J.Int'l L. & Pol. No.2, 743 at 744.

Unlike the situation in Canada again, the Cameroonian Constitution "mentions this question of [judicial] independence only obliquely."[37] The Constitution merely declares laconically, in article 31, that the President of the Republic shall ensure the independence of the judicial authority. Article 31, thus, makes the judiciary no more than a department of the executive.[38] Article 21, on its part, subverts any form of separation of powers (between the legislature and executive).[39] This article 21 states:

> (1) Provided that with respect to the subjects listed in Article 20, the National Assembly may empower the President of the Republic to legislate by way of ordinance for a limited period and for given purposes. (2) Such ordinances shall enter into force on the date of their publication. They shall be tabled before the National Assembly for purposes of ratification within the time limit fixed by the enabling law.

Just how "limited", and what these "given purposes" and "enabling law" are, only the President of the Republic can define.[40]

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[35] CBA/CBC Report, *supra*, note 31 at 25. Chapter Four of this thesis further addresses this.

[36] Which "are much more than jewellery displayed in a showcase,...the very essence of the quality of human life.": *ibid.* at 2.

[37] Anyangwe, *supra*, note 5 at 37.

[38] As we noted in 2.1.3. note 7.

[39] Article 20 specifies the legislative domain, in which we can find "The...judicial system in respect of:...the definition of criminal offences...criminal procedure, execution procedure, amnesty, the creation of new classes of courts..." Article 22 then makes the matters "not reserved for the legislature...[to] come under the authority empowered to issue statutory rules and orders."

It was by presidential decree (otherwise called ordinance) that the judicial institutions of the country were created. One would, therefore, be quite justified in declaring that "[t]here is...nothing like judicial 'power' and less still the separation of such power in Cameroon."[41] Anyone who contemplated judicial independence and impartiality in Cameroon would, consequently, be grossly mistaken.

The Centre for the Independence of Judges and Lawyers (CIJL) is dedicated to promoting the independence of the judiciary and the legal profession in all parts of the world. It has published annual reports documenting the problems faced by jurists in some countries. The purpose of the publications is to stir the international community to action. In the July 1989-June 1990 edition, Cameroon was featured for the first time because of the Yondo Mandengue Black and "The Douala Ten" trial[42] (hereafter *Yondo et al*). A thorough survey of earlier issues showed a glaring recurrence of certain countries, particularly in Latin America, Asia, Africa, and the Middle East.[43] The fact that Cameroon was exposed in just one issue should not be interpreted as evidence of a clean human rights record or of judicial independence. Far from it. Cameroon simply has its own unique way of dealing with a "political recalcitrant" without raising the international scrutiny in such circles as CIJL. Its political "offenders" are never known by such appellation.[44]

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[40] See 2.2.3. notes 71 to 80. "There are no legislative or executive organs. There is a Head of State or a President of the Republic, Assemblies, a Ministerial Cabinet, Ministers, a President of the Council. All these organs participate in the accomplishment of a single function, the governmental function. But they do so with varied powers and authority, by acts which, at times are only political and at times have in addition a legal value." Per G. Burdeau, *Traité de Science Politique* Tome V (Vol.5) at 38 as cited by F. Mbomé in "*Les empéchements du président de la République au Cameroun*" (1978) 32 R.Jur. Pol. Ind. Coop., 905, translated and quoted by Anyangwe, *supra*, note 5 at 34.

[41] Anyangwe, *ibid.* at 35.

[42] As to which, see Brody, *supra*, note 29 at 15.

Mark W. Delancey, writing in 1989, suspected that something must be amiss with this "over peaceful" Cameroon. He discussed some illusory as well as some genuine prevailing beliefs held the world over in regard of the country. "To some observers", he commences his illuminating book, "Cameroon is a glowing success in recent African history, a site of political stability and economic growth and development".[45] To others, Delancey carries on (and this is the correct view):[46]

> Cameroon is a neo-colonial entity, existing under the influence of France, with no benefit of its independence accruing to the bulk of the population, and with revolution and division boiling close to the surface.

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[43] E.g., Brazil, El Salvador, Guatemala, Colombia; China, Indonesia, Singapore, Sri Lanka; Ghana, Kenya, South Africa; Haiti, Philippines, Israel and the Occupied Territories.

[44] If it had one such "offender", there was always an elastic term used to cover and shelve the matter. This term used to be "*la subversion*"- which aptly includes just anything the President did not, or chooses not to, like. But, with the repeal of the 1962 subversion law a little before *Yondo et al*, it has now become "*outrage au Président de la République...*": section 153 of the Penal Code. Section 153(3) even declares that "*La verité du fait diffamatoire ne peut en aucun cas être rapportée*", that is, "the truth of the supposedly defamatory matter can never be proven whatsoever".

[45] M.W. Delancey, *Cameroon: Dependence and Independence* (Boulder: Westview Press, 1989) at 1. The writer, like many others cited in this thesis, is not Cameroonian. He is an American writer.

[46] *Ibid.*

Delancey then examines the history of Cameroon; how and under what conditions it came into existence;[47] the successes and failures it has encountered in its effort to solve the problem of nation building; and, finally, whether the appearance of economic and political success is a reality or a facade. If it is the first alternative, what explains this positive history? If it is the second, how have we been deceived, and what is the reality of the political economy?[48]

Delancey succeeds in "lifting the veil" behind which some politicians had been comfortably pulling the strings of international deception. The country's president, for example, "acknowledges" all what Delancey says concerning Cameroon.[49] Thus, while appealing for a "more open, more tolerant and more democratic political society",[50] the President records the role of the *Union des Population du Cameroun* in trying to free Cameroon. President Biya does this by making a "sincere and patriotic appeal" to Cameroon's:[51]

> worthy children of the land...whose names unfortunately have

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[47] As to most of these conditions and background, also see H.R. Rudin, *Germans in the Cameroons* (Cambridge: Yale University Press, 1968); C. Anyangwe, *The Cameroonian Judicial System* (Yaoundé: CEPER, 1987) [hereinafter *Judicial*]; and N. Rubin, *Cameroun: An African Federation* (New York: Praeger Publishers, 1971); and, generally, Gardinier, *supra*, note 26.

[48] Delancey, *supra*, note 45 at 6.

[49] As to the revolution point, President Biya declares: "Cameroon, more than any other in Africa, is a land of socio-historical multiplicity and diversity, the melting pot of various divergent and opposing forces, and of an infinite number of sectarian or even hostile communities which are living in a kind of permanent vigil of arms [and] where ethnogeographical particularisms are strongly evident."- *Supra*, note 31 at 31.

[50] *Ibid.* at 140.

[51] *Ibid.* at 139-140.

> remained taboo for the past quarter of a century...[to] join us in the ongoing struggle against...[French neo-colonialism] with a view to acquiring real freedom for all Cameroonians.

This invitation is for these "worthy children of the land" to join hands in building:[52]

> [t]he society of communal liberalism...[which] is one of openness, and one that fits into a modern world, [one] that tends towards a more interdependent mankind...the new political society, a society whose economy...[is] at the service of Man and in which social justice...[is] the guiding rule in the distribution of the fruits of our development.

Mr. Biya cannot genuinely desire such a society when he, as head of state and head of government, still "guards" the independence of the judiciary and expects Cameroonians to seriously "believe that something awful is going to happen to us if we follow the example of nearly every other country in the world"[53] by instituting genuine judicial independence and freedoms and rights of the people.

Such attempts to deceive outsiders fail nowadays, however. There are many outsiders who now know the trick. Delancey, *toujours égale à lui-même*, is one of those who is conscious of these ploys and tells the story even better than most insiders know:[54]

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[52] *Ibid.* at 13-14.

[53] Per Lord Hailsham, House of Lords Debates 1382 (November 29, 1978), quoted in H.W.R. Wade, *Constitutional Fundamentals* (London: Stevens and Sons, 1980) at 76. This is, in fact, what President Biya has in mind when he implores Cameroonians not to "borrow[]...rules of conduct" from other countries: *ibid.* at 13. Also compare *supra*, note 8.

[54] Delancey, *supra*, note 45 at 152.

> This [Ahidjo's] concentration of power in the presidency has passed on to Biya and foreign-policy making continues to be largely dominated by the president[[55]]....The transfer of power to Biya did not represent a change in ideology or orientation in leadership. Biya is a product of the same system that produced Ahidjo, a member of the same establishment, and a president acceptable to France. He is clearly in favor of the economic path followed by the Ahidjo government, and thus the boundaries within which he makes foreign policy are similar to those of the Ahidjo regime.

This overview of Cameroonian political culture is indispensable for a better understanding of the place, role and independence of the country's judiciary. We will look at how the collateral factors contribute to or subtract from Cameroon's political and legal culture as it is or as it may become. The same order of treatment as in the case of Canada will be followed.

3.3.1. The Role of the Legal Profession and Academia in Cameroon

Here we shall separate the discussion of the legal profession and academia because, unlike in Canada, these two groups, in Cameroon, have very little or nothing in common. The lawyers[56] will be treated first and legal academics second.

3.3.1.(a) The Role of the Lawyers in Cameroon

We have just seen how Mark Delancey exposes the reality in Cameroon.

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[55] He is not alone here anyway. The British Prime Minister and many others do the same: See H. Berkeley, *The Power of the Prime Minister* (London: George Allen & Unwin Ltd., 1968) at 55.

[56] Again, unlike in Canada, "lawyers" in Cameroon will refer only to those of the Bar while judges and/or magistrates are those of the Bench (including the prosecution). This fact of the bench including the DPP we have already seen in Chapter Two. What we need say here about it is simply that its effects on the judiciary's independence are deleterious and well-calculated (recall 1.1.1. at note 9) since the state prosecutor "who has for over the years been receiving his orders from the Minister of Justice cannot, by being appointed to the bench, suddenly become independent and fearless." Per Anyangwe, *supra*, note 5 at 43. Compare *infra*, note 154.

Delancey's book was, however, not responsible for giving *Yondo et al.* the international attention the case held. The "controversy" involved in the case was said to be responsible for the worldwide attention. Such "controversy" resulted from the massive turn out of lawyers, both national and international, to defend the accused. There is really much to be said about the case and the surrounding "controversy". What interests us here is the fact that these Cameroonian lawyers only came out *en masse* this time because it involved one of their kind, a lawyer- *un ancien bâtonnier-* former President of the Cameroon Bar Council. It is sad in a way. Just hear them at the trial and only then do you realize that Cameroon had law orators, defenders of the constitution, defenders of hitherto apparently non-existent human rights, defenders of that and of this. Hear them now:[57]

> "For eight times the constitution has been violated by those who want to convict Yondo and others";
>
> "I want to pay homage to Cameroonian lawyers who rose up in one accord to defend human rights";
>
> "Let justice and liberty triumph";
>
> "Can a Cameroonian question the way he is governed on a piece of paper?";
>
> "You [the judge] are facing the challenge of Cameroon history today. You are called upon to deliver a juridico-political decision. Do not forget that Paul Biya is a politician; has he the power to

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[57] See "The Regime in Question is the CPDM" *Cameroon Post* (May 20-25, 1990), 5-8.

divide the nation?";

"Have you been called upon to deliver an already prepared judgment?";

"When it will be time for posterity to judge our actions, it will first judge our judges here" and so forth.

Despite all the oratory from these Cameroonian lawyers, most of them do nothing to help avert or ameliorate the situation when they get the chance to do so. For example, just a month or so later, some of the most vocal among them[58] were *rapporteurs* of one of those cloaked commissions[59] of inquiry into the killing and brutalization of university students.[60] Others are ministers and one is even Minister of Justice. Now, one would expect, is the right moment for this Lawyer-Minister to say to the judge: "Let justice and liberty triumph"; and for Madam *Rapporteur* to say: "human rights were violated on campus". But what is the "normal lie"[61] to Cameroonians? The first assists the judge in taking an oath[62] whose upholding is a foregone negation; while from the latter we get the declaration: "*Il y a eu zéro mort à l'Université de Yaoundé*"![63]

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[58] That is Cameroon politics; vocal prospective opposition must be co-opted, and once this is done, there is no more noise and the ship sails dangerously on. Ahidjo left that legacy which must be either completely uprooted or it destroys Cameroonians. See Delancey, *supra*, note 45 at 58-63 for more on this "legacy".

[59] "...there is a growing disenchantment about commissions of inquiry in the Biya regime. For one thing, they have always symbolised official deception at its most treacherous stage...[G]overnment sponsored commissions of inquiry...have always tended to cloak rather than shed light on issues....Since he [Biya] came to power 9 years ago, he has contrived to create commissions only when he intends to shelve an issue." Per M.L. Lokanga, "Student Leader Refuses to Talk to the Endeley Commission" *Le Messager* No. 029 (July 18, 1991), 10.

[60] All these had been predicted in 1959 by Deputy Kemajou as the natural result of the *pleins pouvoirs* law. See V.T. Le Vine, *The Cameroons- From Mandate to Independence* (Berkeley: University of California Press, 1964) at 187 & 188.

[61] This is different from Russell's "noble lie" (1.1.1. note 15) or Baxi's "Great Blackstonian Lie" in 2.2.1.(b) note 29. "Normal lie" because such untrue statements from public officials have not only become usual but are received without the slightest protest.

One would also expect that after such distortion of the facts, the other lawyers would "rise" again "in one accord to defend human rights",[64] dignity and truth. But what is the reaction? Their brothers and sisters of the "noble lie" or the "Great Blackstonian Lie" clique are now silent. They are no longer interested in human rights nor in the Constitution. It does not "concern" them. If it did, as the 1986 Bar Law did, only then would they have fought back like Chief Justice Coke, and the Seven Bishops and their jurors (these fought for the general public though).[65] Just imagine again that when the so-called

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[62] To "render justice impartially to all *in accordance with the laws, regulations and customs* of the Cameroonian people, without fear, favour or malice": section 23 of *Decree No.82-467 of 4th October 1982* (known otherwise as *Rules and Regulations of the Judicial and Legal Service*). It is important to take cognizance of the fact that this is judging "in accordance with laws etc" and *not* also according to principles of justice nor the judge's conscience. What do we then make of this: knowing John Bunyan's Mr. Legality? (as to which, see Denning, *supra*, note 11 at 6-7.) Compare **2.2.1.(a)**; then see text at note 37 of same Chapter Two.

[63] That is to say, "There were no deaths during the incidents at the University of Yaoundé campus." And this false declaration is boldly made even though every member of the public already knew the truth. That public's own reaction to all these will be seen in **3.3.2.**

[64] See *supra*, note 57.

[65] Coke, C.J., boldly asserted the independence of the judges and, time after time, he clashed with the King over it. For example, the King at one point sought to interfere with a decision of the judges on a case by telling them not to proceed with it until they had consulted him. Coke resolutely refused, saying that to obey His Majesty's command to stay proceedings would be a delay of justice, contrary to the law, and contrary to the oaths of the judges. In the Trial of the Seven Bishops in 1688 for publicly asserting that the King had no power to dispense with the laws of England, as the servile and subservient judges had gone on at one point to hold, the jury acquitted them; thus, inferentially holding that the King had no such dispensing power. See Denning, *supra*, note 11 at 10-12. See also K. Loewenstein, *The British Cabinet Government* (London: Oxford University Press, 1967) at 167; and W.B. Gwyn, *The Meaning of the Separation of Powers* (The Hague: Martinus Nijhoff, 1965) at 6.

"notorious Bill"[66] was brought up they violently opposed it by threatening and actually effecting sit-ins; and, because of that action, Cameroon got its first Bill ever to receive a second reading on the request of the President of the Republic. The opposed Bill, however, "sailed through Parliament and was promulgated on the 15th July as *Law No.87-18*"[67] though "[o]n closer scrutiny...that law is only a *slightly* modified version of the 1986 Bill."[68]

Cameroon's lawyers in particular and the public in general must understand that law "is the *common* force organised to act as an obstacle to injustice".[69] In short, the law should be just to the society at large and not just to a small section of it. They must learn to know as well that people who become so self-centred and, thus, lose sight of their government because unjust laws do not affect their limited interest, will find it difficult, if not impossible, to restrain that government from encroaching even in those limited rights of theirs. A momentary lapse is enough for a dictatorship to be installed.[70] We should recall Benjamin Franklin's observation that those who would give up essential liberty and constant vigilance to purchase a little temporary safety deserve neither liberty nor safety.[71] Peter Rodino adds that these are strong words which reflect a passion for *active citizenship* and *participatory democracy*.[72] This, therefore, well explains why Cameroonian lawyers could not prevent another "controversial" or "infamous" law regulating practice at the Bar in 1990. That law is too complex to be fully examined in this thesis. Briefly stated,[73] the law exposes the barrister to vexatious suits from disgruntled clients and further[74] weakens the Bar. Instead of a national Bar, there are now to be provincial Bars. This is a sort of divide and rule: reinforced by the unfortunate arbitrary demarcation between the legal profession and the academia.

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[66] *Bill No.322/PJL/AN.* Note that only what concerns these lawyers becomes "notorious" or "infamous" etc. This was a proposed law aimed at re-organizing practice at the bar as well as preventing university law teachers, not already in practice, from doing so. This also goes to reinforced the no-link relationship mentioned at the begin of this section (3.3.1.).

[67] Anyangwe, *supra*, note 5 at vii.

[68] *Ibid.* My emphasis.

[69] Frederick Bastiat, *The Law* (1950), 67, quoted in Day, *supra*, note 25 at 21.

[70] See Justice Dickson, *supra*, note 13 at 13. Compare Day at *supra*, note 25.

3.3.1.(b) The Role of the Legal Academia in Cameroon

As indicated earlier, the university intelligentsia in Cameroon is generally marginalized.[75] The legal academia is particularly conspicuous and, itself, greatly contributes to its "unexalted" position in society.[76] This is because of the generally elusive and rather escapist position the few of its members (who even try to) do take on vital societal issues on which, normally, they are supposed to provide more authority than most other groups of the community. The examples are legion but just one would be enough to clarify the point.

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[71] L. Labarec, ed., *6 Papers of Benjamin Franklin*, 242, referred to in P.W. Rodino, "Living with the Preamble" (1990) 42 Rutgers L. Rev. 685 at 700.

[72] Rodino, *ibid.*

[73] For the full text of the law, see "President Biya Gives Fatherly Ear to Lawyers' Cry, Says New Bar Law will be Reviewed" *Cameroon Post* (July 31-August 07, 1990) at 13-14; and *ibid.* (August 08-15, 1990) at 7, 11, & 15.

[74] The Cameroonian Bar, in the first place, is not headed by the Attorney General; and "is in reality simply a trade union or syndicate of private lawyers": Anyangwe, *supra*, note 5 at 114.

[75] See *ibid.* at viii. See also *Judicial*, *supra*, note 47 chapter 17.

[76] "We here in the Law Faculty are partly responsible for perpetuating this mischief": *Judicial*, *ibid.* at xv.

In *l'Affaire Société des Grands Travaux de l'Est (SGTE)* c. *État du Cameroun*,[77] the Supreme Court decided that (1) retroactive legislation which violates the Constitution is not unconstitutional and cannot, therefore, be struck down because the non-retrospection principle (specifically violated) is enunciated *only* in the preamble of the constitution;[78] and (2) even assuming that the said legislation violates the *constitution* (as, indeed, it did), only the President of the Republic- the violator[79]- could refer the matter to the Supreme Court per article 10 of the same constitution.

Commenting on that decision, Professors Pougoué and Kamto cite many French decisions unequivocally affirming the constitutional value of the preamble of that country's 1958 Constitution "*dont s'inspire fortement notre droit constitutionnel*".[80] They then affirmed that "*le principe de la non-rétroactivité des lois a été affirmé par le constituant camerounais de 1972*" but

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[77] (C.J.F. *Arrêt* No.4, 28 October 1970), (1962-1970) 1 *Recueil Mbouyoum*, 118.

[78] This *ratio* grossly ignores the fact that *l'interêt supérieure de l'État* which has been employed now and then to suppress the Cameroon people is also found embedded in that preamble. Moreover, the principle of non-retrospection is also embedded in section 3 of the *Code Pénal*.

[79] In the sense that he is the sole law-maker as seen in 2.2.3.

[80] P-G. Pougoué and M. Kamto, "*Loi No. 89/018 du Juillet 1989 Portant Modification de la Loi No.75/16 du 08 Décembre 1975 fixant Procédure et le Fonctionnement de la Cour Suprême*" (*Janvier-Février-Mars* 1990) *Juridis Info* (*Revue de la Legislation et Jurisprudence Camerounaise*) No.1, 5 at 8. *Translation*: "from which our constitutional law heavily draws". Compare with note 17 above.

"*au contraire le juge Camerounais a adopté sur cette question une position particulièrement frileuse.*"[81]

About an earlier decision of the Court, based not on the preamble but on an article of the Constitution but still justified in the same way, Pougoué and Kamto declare that:[82]

> *[u]ne telle conclusion est illégitime dans la mesure où dans les affaires sus-citées, la Cour s'est prononcée sur des principes incorporés au dispositif de la "Constitution".*

In respect of another very recent retrospective law[83] they question whether "*la reforme [est] contre la constitution*";[84] but instead prefer to state that the answer remains open[85] because, in effect, "*la valeur constitutionnelle de ce principe n'est pas définitivement tranchée en droit positif.*"[86] These learned professors rebuke the courts in Cameroon for grossly failing to definitively lay the question (of the constitutional validity of the preamble) to rest.

It is submitted, however, that if the judiciary has abdicated that function, as it has, it is not only because its hands are "chained at the back."[87] In addition (and more importantly), it is due to the fact that the country's university intelligentsia and legal analysts have, for too long, taken and continue to take, an escapist attitude on the issue. Rather than come out boldly (like Coke) and denounce illegality outright when it is spotted, the very few who have even attempted an analysis, have always shifted responsibility completely to the courts or judges. And they do this without appreciating, in the least, that these judges are helpless in the stark absence of authoritative texts from the legal academia (in particular[88]) on which to pin their (judges') "creative" departure from the "traditional" (chained) stance.

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[81] *Ibid. Translation*: "The constitutional validity of the 1958 French Constitution has been unequivocally established by the courts of that country but those of Cameroon continue to adopt a particularly unusual or shaky position on the issue".

[82] *Ibid. Translation*: "Such a ruling is wholly unjustifiable as the court was dealing with principles embodied in the constitution itself, not just the preamble." It is, however, being stressed here that the preamble is part and parcel of the Constitution; and if that document even has to be classified, it is this preamble that ranks first.

[83] The very July 1988 law which is the topic of their commentary: *ibid.*

[84] *Ibid.* at 7.

[85] "*Le débat reste ouvert, et une lecture courageuse de la Constitution par le juge serait certainement d'un grand secours à cet égard*": *ibid.* at 9.

[86] *Ibid.* at 7.

For example, on the 1972 Cameroonian Constitution as a whole, the professors agree that "*on peut légitimement constester [s]a valeur constitutionnelle.*"[89] But, again, instead of standing *firm* (like the Seven Bishops) and demonstrating to the judges just why and how the constitutional validity of that Constitution should be contested, they immediately come in with: "*Cependent, on peut également soutenir, d'un point de vue logique, sa*

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[87] See "Former Judge Nyo' Wakai Talks to *Le Messager* on the Cameroonian judicial System" *Le Messager* (6 June 1991), 18-19 at 19.

[88] One would not even dare talk of political scientists since the country's unique *Université de Yaoundé*, one of whose only three faculties is *la Faculté de Droit et des Sciences Economiques*, has nothing like the Department or Faculty of Political Science. One is not saying, however, that the absence of such department *ipso facto* means the country lacks political scientists. There may actually be more of them than lawyers; but it is simply hard to recognize one in the Cameroonian polity.

[89] *Supra*, note 80.

valeur constitutionnelle."[90] What is their argument for this abrupt and surprising *re-prise de position*? Their "*point de vue logique*" is not at all logical in any sense of that word:[91]

> *Car s'il ne pouvait en être ainsi, les principes généraux de droit et les principes fondamentaux qui y sont inscrits n'auraient pas de sens et, se trouveraient sapés les fondements mêmes de notre ordonnancement juridique. En particulier, il n'y aurait plus de protection constitutionnelle des libertés publiques!*

These learned professors think that the Constitution should be upheld all the same; because of fundamental liberties and human rights therein protected. But one cannot fail to ponder on the human rights and liberties they are talking about, especially as they themselves clearly state that these rights and liberties, "*dans la Constitution de 1972...ont été refoulés dans le préambule.*"[92] And, moreover, that is the preamble we are being told has no effect. Yet, they talk of upholding that constitution because of that portion of it! Nothing describes it better than "nonsensical escapism".

It is important to remind ourselves here of Judge Learned Hand's 1960 statement:[93]

> A society so riven that the spirit of moderation is gone, no court can save; a society where the spirit flourishes, no court need

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[90] *Ibid.* That is, "logically, however, the constitution should be upheld". Compare 2.2.3. notes 78 to 88.

[91] *Ibid.* Translation or explanation at the end in my comments.

[92] *Ibid.* ["that constitution relegated such rights to the preamble"].

[93] Learned Hand, "The Contribution of an Independent Judiciary to Civilization" in I. Dilliard, ed. *The Spirit of Liberty* (1960), 155 at 164, quoted in L.W.H. Ackermann, "Constitutional Protection of Human Rights: Judicial Review" (1989) 21 Colum. Hum. R. L. Rev. No.1, 59 at 71. My emphasis.

> save; and *a society which evades its responsibilities by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish*.

The society as a whole must assume its responsibility therefore.

3.3.2. Role of Public Opinion in Cameroon

Judge Learned Hand's lesson and the advice given by Archer and Reay[94] have, unfortunately, been greatly down-played in many communities. Otherwise, we would no longer have all calls from the international human rights organisations such as Amnesty International and the CIJL. This is because, to the best of our knowledge, no modern state constitution exists today which does not "guarantee" citizens' rights and freedoms, nor declare its adherence to the United Nations Declaration of Human Rights, nor "guarantee" the independence of the judiciary.[95] Yet, many governments do not hesitate to undermine the judiciary when it seeks to prevent government lawlessness. When this happens in Cameroon, what is the reaction of the Cameroonian masses? What do they do when, for example, a judge is sacked for not "toeing the line" (that is, for trying to defend justice)?

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[94] See *supra*, note 28.

[95] In this regard, the numerous volumes and editions of Amos J. Peaslee's *Constitutions of Nations* (The Hague, Netherlands: Martinus Nijhoff, 1965 & 1974) have been very helpful. Both the "federal" and unitary constitutions of Cameroon, 1961 and 1972 respectively, are found therein. It must, however, be pointed out that what is found in them today may be radically different from what obtained when Peaslee published them. This is due to the president's (practically) unlimited powers to tailor and re-tailor the constitution or even unilaterally throw everything away for a completely new and strange one.

Until very recently[96] they, as usual, make noises within the four corners of their rooms instead of filling the streets in protest for change and justice. Maybe they still strongly believe in the declaration "that a great destiny awaits Cameroon".[97] The *few journalists,*[98] who fail to see how that is, are singled out and silenced while the bulk of Cameroonians look on helplessly. Can it be that there is nothing that can be done? Can one person possibly do this to a nation? It is surely time "this country grew up constitutionally and stop mumbling feebly that nothing can be done."[99]

True, indeed, a great destiny may await Cameroon. But one wonders for just how long Cameroonians must await that great destiny. Maybe, to adopt the words of one prominent Cameroonian writer, "the time has come to elucidate on the doctrines that [have been employed to mis-] guide the Cameroon

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[96] The exception does not even have to do with judicial independence. It has mostly to do with whatever concerns them as individuals; e.g., as university students fighting for "*epsi*"- i.e., the monetary allowance paid out to them; or as "*sauveteurs*" (hawkers) fighting against the municipal authorities for chasing them away from the streets of downtown. But it is soothing, at least, to see that they are now beginning to be aware of their right to demonstrate as well when not satisfied with government acts or actions.

[97] Biya, *supra*, note 31 at 27-28.

[98] See, e.g., "Gov't, CRTV Management Mount Anti-Anglophone Campaign: Julius Wamey, Others Suspended" *Cameroon Post* (June 06-13, 1991), 1 at 15.

[99] Wade, *supra*, note 53 at 34. May it, again, be that the Cameroonian masses really think nothing can be done since their government is grossly insensitive to public opinion? For example, talking about the recent reintroduction of the prime minister post in Cameroon, Barrister C.N. Etinge states that it "is only a desperate effort of an uninspiring government pretending to the people that it is open to dialogue [because] [t]he new deal government...has failed very colossally to admit and acknowledge the importance of public opinion. The chaos, the holocaust that visited this nation only climax to ineffective leadership saddled with a corrupt administration which has elements of bent minds.": "Proposition for the Agenda of a National Conference" *Le Messager*, *supra*, note 87, 6-7 at 6.

People".[100] The patience of Cameroonians may now be worn out; so, the oft-cited "absence of a real nation due to persisting ethnic, religious and linguistic particularism[]."[101] may no longer be enough to fool them. *D'ailleurs:*[102]

> *Ils sont maintenant presque tous debouts. Ils ne veulent plus des mensonges; c'est la verité qui compte à l'heure actuelle. D'ailleurs même, le Cameroun n'est pas le seul avec ces problèmes. Le Canada les en a. Plus grave même. Mais il ne les a pas utilisé comme excuse pour eliminer les droits et de la liberté. Pourquoi c'est autrement au Cameroun? La réponse est très simple*:

It is because, unlike in Canada, in Cameroon there has been a stark failure to build democratic institutions or structures, as already noted. As a result, regional, ethnic and cultural diversity, class interest and mass aspirations, ideas of social justice, equality and democracy, cannot be harmonised and unified and so must be suppressed.[103]

3.3.3. The Role of the Press in Cameroon

Whenever criticism of abuse is possible, and governments may be made uncomfortable, the public conscience is alive. Any protest which will keep it awake is to be welcomed. For during a lull that conscience may fall asleep, and history can point to many communities where its slumber was seen, too late, to be the sleep of death.[104]

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[100] Biya, *supra*, note 31 at 9.

[101] *Ibid.* at 28.

[102] *Translation*: Now may be the time for the truth because the people are now aware of the deception. Moreover, Cameroon is not alone in having this "problem". Canada's is even more aggravated (see 2.2.1.(c) note 45). But it has not used that as an excuse for destroying basic human rights and freedoms. Why is it otherwise in Cameroon? The answer is very simple: In text.

[103] For elaboration, see M. Szeftel, "Editorial: Warlords and Problems of Democracy in Africa" (1989) 45/46 R.O.A.P.E. 3 at 6-7.

Ahidjo had succeeded, after his *pleins pouvoirs*,[105] in establishing his style of rule in Cameroon for several other reasons. The following, *inter alia*, may be briefly recalled here. We would broadly class them under the three headings: centralization,[106] coalition building,[107] and repression. Aspects of repression include:[108] the suppression of human rights; legitimized repressive tactics through the institution of the state of emergency. "Force, whether legitimized by law or not, was a major factor in Ahidjo's effort to build a national political system and to maintain that system."[109] And in doing this the police, gendarmes, SEDOC (*Service de Documentation*), BMM (*Brigades Mixtes Mobiles*), censorship of press, radio, television, spies, and so forth are all employed.

But with the reappearance in about 1988 of some independent press agencies[110] (against all the threats of ban and torture from government), people found in them an independent means of expressing their long-suppressed opinions. The activism of some of the papers[111] caused a rethinking within the official press because its readership dropped almost to zero as everybody went for "the papers of the truth," as they were referred to. News was, thus, no longer the sole preserve of the official media- press and radio. The arrival of television in Cameroon in the mid-eighties, too, had a major impact. Though government owned and managed the television network, the government monumentally miscalculated, initially, in thinking that by focusing TV news principally on events abroad (such as problems in Eastern Europe, the defunct Soviet Union and elsewhere) it could completely divert attention from its own already explosive situation at home. But rather than shift attention as preconceived, these issues only went to accentuate and nourish the people's desire for a better society, a desire sparked off by young school children in 1983 in Bamenda.

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[104] Archer and Reay, *supra*, note 27 at 107.

[105] As to an elaborate discussion of the obtention of which, see Le Vine, *supra*, note 60 at 186-188

[106] See Delancey, *supra*, note 45 at 52-58.

[107] See *ibid*. at 58-63.

[108] See *ibid*. at 63-65.

[109] *Ibid*. at 63.

[110] Radio and television still remain state monopolies.

The anglophone minority is also very instrumental in this metamorphosis. English-speaking Cameroonians have been very vocal in recent years. The *few* of them on national radio and television, CRTV (Cameroon Radio & Television), have constantly defied government instructions to tell lies, especially in the Sunday morning programme, "Cameroon Calling". This programme has won the hearts of not only the English-speaking listeners but the French ones as well. The Television counterpart (to "Cameroon calling"), "Minute by Minute", was killed even before it was born. These English-speaking journalists, as already

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[111] It must be indicated that the problem of perception in 2.2.4. applies as well to what the journalists are expected to do in society. Compare *supra*, note 98.

indicated, have been continually harassed as a group. But many of them are devoted to seeing a change. However, Anglophones (the politically active segment) cannot as yet provide a force to be reckoned with in the Cameroonian polity because of the rancour between the two anglophone provinces, which is due to myopia and selfish-interest rather than to any real gulf between them.[112]

Anglophones complain about:(1) Biya's change of the country's name, (2) what they consider to be their continued under-representation in positions of authority,[113] (3) proposed changes in the university's teaching and examination processes,[114] and (4) police brutality. A strike by anglophone students and violent demonstrations occurred in Bamenda in 1983.[115] In 1985 a prominent anglophone lawyer, Fowgum Gorji-Dinka, was arrested after distributing a statement declaring the current regime unconstitutional[116] and calling for the establishment of a confederation.[117]

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[112] See, e.g., T. Dibussi, "Challenging the Ambazonia Fantasy" *Cameroon Post* (June 6-13, 1991), 6.

[113] Will anglophone Simon Achidi Achu's appointment as the president's prime minister, hedged with the barb wire as it is (see article 26 (*nouveau*) constitution) be sufficient to quieten these "Anglos"?

[114] See, e.g., J.M. Mvondo, "On Graduating from the Yaounde University" *Cameroon Post* (12-19 August 1991), 6: arguing that many graduates pass through that university without the university passing through them because "a graduate of law," for example, "knows little or nothing outside law. He is a[n]...illiterate in computer science, etc. The science graduate is no better as he knows little outside botany, geology and zoology." Whose fault? The graduates' or the system or both? he asks. His answer is, it is the university's, and he goes on to illustrate. The present writer can vouch for the veracity of Mvondo's statements by simply indicating how he, having gone as far as the third year in the doctoral programme in that university, met and learnt how to operate the computer, for the very *first* time, only on his arrival at the University of Alberta.

[115] This was (as noted), in fact, the first signal to the violent demonstrations for change begun in May 1990 that later rocked the entire nation and which continues till date to bisect the *Université de Yaoundé* in particular.

But, the public and the others apart, whose duty, constitutional or otherwise, is it to defend or "ensure" judicial independence?

3.4.0. The Constitutional or Official Defender of Judicial Independence

Canada and Cameroon present very interesting answers to the inquiry.

3.4.1. In Canada

The Chief Justice is, nominally,[118] supposed to constitutionally defend and preserve judicial independence and integrity in Canada.[119] Chief Justice Dickson, however, suggests that the Chief Justice can do this task better if he, and not the Minister of Justice, controls the judicial budget and its allocation, as well as having the effective control of the administrative personnel.[120] This stance seems to conflict with Russell's positive discussion of the establishment, in 1977, of the Office of the Commissioner for Federal Judicial

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[116] See "The Gorji-Dinka Concept of a New Social Order" *Le Messager*, *supra*, note 87, 5.

[117] Delancey, *supra*, note 45 at 74-75.

[118] Only nominally because of the country's deep-rooted tradition of entrenched and conventional independence of the judiciary.

[119] See Russell, *supra*, note 6 at 88 n.45 and passim. For an elaborate discussion of the chief justice's status, powers and role, see Canadian Institute for the Administration of Justice, *Compendium of Information on the Status and Role of the Chief Justice in Canada* (International Centre for Comparative Criminology, *Université de Montréal*, October 1981).

[120] Justice Dickson, *supra*, note 13 at 20.

Affairs, which we will examine in Chapter Five. Whatever the case, we have already demonstrated that judicial independence in Canada has become so deeply rooted that it would be difficult to dispute its importance.

In Britain, from where Canada heavily draws, it is the Lord Chancellor's duty to ensure and defend judicial independence. And:[121]

> [i]f he does it well, he is a good Lord Chancellor whatever his other defects. If he does it ill, whatever his other qualities, he is not. To discharge this function well it is necessary that he should be a member of all three traditional branches of government and, in the legislature, that he not be member of the House of Commons.

3.4.2. In Cameroon

In Cameroon, on the other hand, it is the *Unholy Trinity* who guards or ensures that independence.

In the Federal Republic of Cameroon, the President was, as he still is, the guardian of the independence of the judicial authority which administered justice in the territory of the Federal State in the name of the Cameroonian People.[122] It is also of interest that it was decided that he should "guard" that independence. Normally, one only guards something one fears will escape one's control or possession either by itself or by being taken away by someone else.

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[121] The Rt. Hon. Lord Hailsham of St. Marylebone, "The Office of Lord Chancellor and the Separation of powers" (1989) 8 Civil Justice Quarterly 308 at 311. Lord Hailsham refers to the Lord Chancellor in the performance of duties (at 317) as "the Holy Trinity". This graphically contrasts with Cameroon's *Unholy Trinity* (i.e., head of state, of government, Chief Justice, and the rest you can name).

[122] Art.32 F.C. In 1972 this became art. 31 and the word "guards" was substituted with "ensures".

The judicial institution seems to have matured in the unitary state. It is referred to[123] as "the judiciary". In the 1961 constitution, as we have seen in Chapter Two, it was referred to as the judicial authority. This maturity, however, is only apparent because the "authentic French version"[124] still talks of "*l'autorité judiciare*" instead of "*le pouvoir judiciare*".

Another very important point to be noted is that, before 1972, justice was administered in the name of the Cameroonian People by the "competent courts".[125] Since that year, it "is administered in the territory of the Republic [which?] in the name of the people of Cameroon"[126] (by whom? nothing is said). It should be noted too that the Cameroonian People in the "federation" were capitalized, one would think, as some sort of emphasis of their significance in any government action. But they become, in the subsequent constitutions and regimes, nothing, insignificant, mere things[127]; only Cameroon now matters. And Cameroon, as we see time and again, in those constitutions- some people may not know- means nothing else than the Head of State who must be capitalized everywhere therein. He[128] now administers *his justice*; it is not the competent courts of any state, be it federal, unitary, or simply *république*!

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[123] Both in the title of Part V and in the wording of article 31 U.C. (portions of which also gained autonomy by becoming separate subsections).

[124] In Cameroon, only the French version of official documents will be considered as authentic. See article 59 F.C., which became article 44 U.C., now article 39 R.C. This is very unlike section 18 of the Canadian *Constitution Act, 1982*, which makes both versions authentic and of equal strength. Moreover, this ***unique*** language "rights" article of each of those Cameroonian documents vividly contrast with sections 16-23 of the Canadian. Some commentators see in the "language rights" article, "the deliberate subordination of the Anglophone and his language": M.L. Lokanga, "The Second Fiddle Syndrome" *Le Messager*, *supra*, note 87, 17.

[125] Art.32 F.C.

[126] Art.31 U.C.

[127] See, e.g., the preamble which reads: "The People of Cameroon:- Proud of *its* cultural and linguistic diversity, a feature of *its* national personality...." It is not clear as to what the possessive refers. Is it to the people of Cameroon or to Cameroon?

Cameroonians were in the "national unity" induced sleep when, abruptly, they were awakened and asked to notarize a document which, unknown to them,[129] was the death warrant of their rights and freedoms. Today, as a consequence of that 1972 validation of the unitary state that had until then been existing under the cover of a "federation", "Justice" is simply "administered in the territory of the Republic in the name of the people of Cameroon". It is important to note that Justice is capitalized not just because it begins article 31(1). That article, in my view, simply amounts to this:

> small "justice" as the *president* of the *Republic* sees it through his *Ministry of Justice*, shall be meted out in the territory (belonging to the *president*)[130] of the *Republic* on the people of (the owner of the territory called) Cameroon.

What is consoling, at least, is that most Cameroonians are now fully aware of the real intentions and meanings of their rulers' words and deeds. They are all double-talkers. Hear, again, for example, how in *1984*

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[128] And it must always be a "he" (see 2.2.3. note 71.). Even in the successive governments and countless cabinet changes the representation of women is blatantly insignificant. Yet they constitute more than half of Cameroon's population. The one or two female ministers that are presently in government (and there are over twenty ministries in this small and developing country) are left in newly created ministries (such as that of Women's Affairs).

[129] "The 1972 Cameroonian constitution was never publicly debated and discussed. Even its actual drafting was shrouded in secrecy and the people were called upon in a referendum to vote for a constitution whose contents they knew nothing about": Anyangwe, *supra*, note 5 at 133 n.18.

[130] Mr.Biya does not even pretend about this when he talks of "all the children of *my* country": *supra*, note 31 at 140. My emphasis. Compare 1.1.1. note 9.

Cameroonians are told that "national unity" is already there to stay, so that the country's name must simply revert to pre-unification francophone *République du Cameroun* rather than United Republic of Cameroon.[131] This was because, according to Biya, there was only *one Cameroon people* with nothing left to be united.[132] Yet, in *1986* it is written, sung, and brought up every now and then (when the people want to live freely) that ethnicity, regionalism, culturalism, "religionalism", linguistic affinities, you name the rest, *are* disturbing the *attainment of "l'unité nationale"*: a goal which is now being stubbornly aimed at through the *New Ethnic Group*.[133] What seems even more incomprehensible in all this *logic* is the fact that the Cameroon people are supposed to be "*proud of its cultural and linguistic diversity, a feature of its national personality*".[134] Where, actually, do we then stand?

The truth, indeed, is that in Cameroon courts- to avoid the term "judiciary"- were never intended to be independent and impartial (especially as concerns the controversial functions). This became even more evident after

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[131] *Ibid.* at 9.

[132] See Delancey, *supra*, note 45 at 70. It would seem that "national unity" in Cameroon simply signifies the obliteration of all vestiges of its English inheritance.

[133] That is, the strange creation of one ethnic group (from the over two hundred and fifty existing ones) for the whole of Cameroon. See Biya, *supra*, note 31 at 30. How is that possible? And, if one may ask, what is this strange ethnic group like? Or what will it look like? What will it be called? After a thorough *melange* (as I suppose) of the two hundred and sixty or so ethnic groups of Cameroon *plus* French (and English) culture(s)- or must we leave this/these out?- what new tongue will be that of the NEG? You may already suspect the answers to these and many other questions. One would, however, not want to guess; preferring to be told the *real* answers.

[134] See *supra*, note 127. My emphasis.

1972. Otherwise, it would not be the president of the republic (like the king in Coke's days) who "guards" that independence. One is not unaware that it may be impressed on us that the president now no longer guards but instead "ensures" it. The response to that would be uncomplicated. It makes little or no difference. And if there is any difference at all, it is for the worse.[135] "Besides, nowhere[[136]] is it said how the President is to ensure this independence, it being left, presumably, for the President himself to decide how to do so."[137]

And the President has, indeed, just been doing it his own way. At this juncture, *Le Messager* and retired Justice Nyo' Wakai should be brought in to complete their talk, begun in Chapter Two. In the course of that talk you will be told just how well the president has been performing his constitutional duties of "ensuring" the independence of the "judicial authority":[138]

> **Le Messager:** How free are members of the Supreme Court?
> **Judge Nyo' Wakai:** Members of the Supreme Court are not free from external pressures and influences.[[139]] Two examples will suffice and you can make your conclusion. The first case

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[135] See 2.1.3. note 14; and *supra*, notes 37 to 41.

[136] Knowing fully well that Cameroon, again, unlike Canada, does not have, nor depend on, conventions and any constitutional customs: the constitution meaning just anything the president makes of it. One would, therefore, not be wrong in stating that any traditions at all that Cameroon may boast of (see *supra*, note 62) simply "vary with the foot of the President of the Republic". See also 2.2.3. note 73.

[137] Anyangwe, *supra*, note 5 at 37.

[138] See Judge Nyo' Wakai, *supra*, note 87. Capitals as in original. My notes.

[139] For an elaboration of some of these influences, see Anyangwe, *supra*, note 5 at 48-54.

happened a few months before President[140] Remy MBAYA was removed. The Minister of Justice had written a letter to him ordering him to treat a particular case file quickly.[141] The Honourable Minister went on to give the exact date when the file was passed to the President. Typically, the President summoned a plenary session of the court and read out the letter. I was astounded. So was everyone. What interest could the Honourable Minister possibly have in a particular case? Someone was surely following up the movement of the case file. Who could this be? Not the small litigant to whom Cameroon Ministers are virtually inaccessible. It was obvious that pressure was being subtly applied. The second case happened in May 1988, shortly after the President of the Republic had taken his oath of office consequent upon the outcome of the anticipated Presidential Elections of that year. As usual, the Supreme Court was required by law to elect three members to represent it in the Higher Judicial Council. The said elections were scheduled for a certain Monday. The incumbent Minister spent the weekend inviting members of the court to his home in an effort to prevail on them not to vote for a certain member of the court considered to be popular among his colleagues and whose guts he could not stand. This was so revolting to most of those invited that President MBAYA, being one of them, [fel]t himself compelled to disclose the fact to members in the session scheduled for this purpose just before nominations commenced. Other members revealed the pressures that were being brought to bear on them. In the case of one member, he disclosed that the Minister had sent a good friend of his, also a member of government, to request him to toe the line and promising him promotion to the super scale. The Minister received a shock when the court voted against his wishes. The result was that all those who had been invited to be cajoled by the Minister were transferred from the court with their darling colleague. The law whereby the Supreme Court elects its own members of the

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[140] This is what will be Chief Justice in Canada. A foreigner visiting Cameroon may find it really difficult to decide what "president" in the country really signifies. This is because every little or large grouping has a president. Cameroonians, it would seem, derive pleasure in bearing this title, maybe, because that office, having been virtually put beyond their reach, they have to find solace in the title of its holder. It is not even uncommon to find someone in Cameroon being *Monsieur le Président* of himself!

[141] The closest Canada has come *in modern times* to experiencing a serious breach of the principle of non-interference in judicial decision-making occurred in the *Judges Affair of 1976*. See Russell, *supra*, note 6 at 78-81. In Cameroon, it is not an infrequent occurrence (despite that it is "prohibited", as we saw in the last chapter, by section 126 of the *Code Pénal*.

> Council has since been amended leaving the court with only the power to propose ten names[[142]] out of which the President [of the Republic and head of the Higher Judicial Council] selects three. That is how free members of the Supreme Court are. I hope that answers your question.

And that is exactly, I would add, how the President of the Republic guards their independence. He "guards" or "ensures" that the judiciary not be independent of the executive (of *himself* specifically).

There is a response, however, from the executive head who would want us to believe that, if that judicial authority is not independent (as surely it is not), it is not the executive branch of government that is responsible. The President is just performing his constitutional duties, and doing them exceedingly well:[143]

> In Cameroon under our administration, it is not the Government that is threatening the independence of the judiciary; rather it is the Government that is protecting it through the status given to the judicial officers,[[144]] through the vigilance and discipline which my constitutional powers require that I exercise over the functioning of the judicial service.

If the president is doing his job well and the government is not responsible, and yet all agree that the judiciary is not independent; what then is responsible for that state of affairs? The government again has a ready-made answer:[145]

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[142] One is wondering what the composition of the court is. See 2.2.3. note 76. But, as it has to propose ten names, one could legitimately guess that this number is less than half of the court's composition.

[143] "*Rentrée solennelle de la cour suprême*", *supra*, note 5, translated and quoted in Anyangwe, *supra*, note 5 at 48.

[144] And as we already know from Chapter Two (see between notes 94 & 97) and the preceding parts of this Chapter, that status is, indeed, a low and highly dependent one, and reduces them to beggars vying for petty favours from the executive.

> What are threatening the independence of the judiciary are, in fact, the pressures exerted from other sources such as tribal or professional solidarity, social affinities, and complicity with certain interests, which tend to numb consciences and lead to partiality and injustice.

All this is quite intriguing. But it is obvious that the President's explanation, even if in part right, is unconvincing to anyone who has the facts. What it at best does is leave us unimpressed and with a sour taste of "*déjà-vu*". The President himself knows deep down that he does not convince anyone who has all the facts (as you and I do, from previous Chapters and above). Not even himself and the justices who, at the end of it, clap all the same. The full force of the ridicule (both of what is said and the clapping) comes to us when we know:[146]

> it is remarkable, but by no means surprising, that the Cameroonian judiciary depends on the executive for its independence. Moreover one of the major complaints often voiced by many a Cameroonian *magistrat* is the creeping politicization of the profession; a fact that has led to apathy, frustration, fawning and the currying for favours exhibited by many judicial and legal officers.

That the judiciary is not distinct and independent in Cameroon is impossible to deny. But what is to be done?

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[145] Still as in *supra*, note 143. Compare text around note 97 in Chapter Two. It would seem that weakening the profession (*supra*, note 74) and destroying tribes (*supra*, note 133, which incomprehensibly contrast with note 127 above) are the Presidents' answers to the problem of judicial dependence in Cameroon. Yet, this very professional *solidarity* must be seen to exist among judges so that none of them can be free to decide a case in his or her own way. See 2.2.2. note 50.

[146] Anyangwe, *ibid.* at 21.

3.5.0. On Recommendations

The International Centre for the Independence of Judges and Lawyers has made the following proposals as a possible solution to the problem:[147]

> First, the United Nations should establish a mechanism to report on situations in which the independence of the judiciary is being undermined or in which judges and lawyers are under attack.
> Second, governments should guarantee the independence of the judiciary and the legal profession and prosecute more aggressively those who commit crimes against lawyers.[148]
> And thirdly, that bar associations everywhere should become more active in the defence of their persecuted colleagues.

Point one is very plausible, provided effective action can be taken after the report. But what is the effective action that can be taken in this wise by the United Nations? That remains a matter for speculation[149] in view of the principles of sovereignty and of equality of states.[150] And while speculation goes on, what happens? The second proposal, in my view, begs the question insofar as the government is the very institution which often undermines that independence. It would certainly be stupid for us to expect that it would prosecute itself. Even in the event of such prosecution, it is both judge and party.[151] We have just seen how the Cameroon government guarantees the judiciary's independence. As concerns Justice Nyo' Wakai's proposals, one asks to know who these people "in positions to influence policy in this respect" are. There is only one such person in the present Cameroon. And, surprisingly ironical, this is the way that *only* person sees fit to guarantee the independence of the judiciary. So, simply saying that he should do "something" "to influence policy" in that respect is saying he should influence himself to guarantee that independence: which is just what *he* thinks he is doing; and doing it so well too! As to point three, the gravamen of this Chapter is that it should not be limited only to their persecuted *colleagues*.

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[147] See Brody, *supra*, note 29.

[148] Justice Nyo' Wakai suggests something similar. Dr. Anyangwe's discussion, he recommends, of the "place, role, and independence of the judiciary in our governmental system is most illuminating and deserves *serious consideration of those who are in positions to influence policy in this respect*": "Foreword II" in Anyangwe, *supra*, note 5 at xix. My emphasis.

[149] "It may be hoped that in time respect for individual freedom will be protected by formal safeguards, recognized in International Law, enforced in international tribunals, and accepted as binding by the legislative and judicial organs of national governments. But as yet the key to human rights has not been delivered to lawyers." Per Archer and Reay, *supra*, note 27 at 22. Yorman Dinstein may, therefore, be right in giving as one of the most dissatisfactory aspect of contemporary international law, its creation of human rights "which except within the ambit of regional organisations in Europe and in the American continent, are rarely" judged and sanctioned by an international tribunal as against the behaviour of state organs. See Y. Dinstein, "Opening Remarks" (1989) 21 *N.Y.U.Int'l L. & Pol.* No.3, 451 at 462.

[150] See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, October 24, 1970, U.N.G.A. Res. 2625(XXV), 25 UNGAOR, Supp.(No.28) 121; and article 6 of Organization of American States, 1948, 19 U.N.T.S.3. As to the consequences of these two principles in international law, see J. Stone, *Visions of World Order: Between State Power and Human Justice* (Baltimore: The Johns Hopkins University Press, 1984) at 73, 77, 78.

3.5.1. Concluding Remarks

On the whole the answer lies with the people concerned. Everyone in the state, not just the lawyers, judges, and law teachers, though these are on top of the list. It is important, therefore, that each and every member of the society be involved in the guarantee of judicial independence. Sir Edward Coke, bold and fearless, the Seven Bishop Jurors, Judge Marshall, and others you can name, would have all failed in their various enterprises if the very *people* for whom they struggled had not stood by them. This is because:[152]

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[151] And the consequences of this, already known, are further elaborated on in Chapter Four.

> [i]f the American people fail to assume their responsibilities to government, it is not inconceivable that the law could become an instrument of oppression in this nation.

The *public* (including members of government as well) *must* understand that the diminution of judicial independence is the unmistakable preface to the annihilation of their rights and freedoms. Human rights are rooted in the collective rather than individual responsibility. Judges must not, however, smile too much and consider themselves *sole* beneficiaries of these proposals. The independence of the judiciary:[153]

> is not an end in itself; it is a means placed at the service of the community. *The judiciary must not seek its claim in the name of privileges of its members or for the pleasure of an Olympian affirmation of its own power*. Its independence and dignity must be defended in the *common interest of our peoples*, and in particular in the name of the most humble elements of society, of *those who most intensely rely upon a free, efficient, altruistic, honest and wise system of justice*.

This thesis, therefore, advocates, first, everyone's involvement in monitoring violations of not only his or her rights and freedoms, but also those of neighbours. Second, that a system of reasonable checks and balances be further put in place and jealously upheld. With these, we would have overcome four-fifth of the problem. This is what, to my mind, is the solution. Canada seems to have little or no problem with the issue of judicial independence not only because of its politically active citizenry but also because of its governmental system and structure. The entire present Cameroonian set-up must be destroyed in preference for a new one if the judiciary is to be free. This has to be done if Cameroonians must have the rare pleasure of living in an egalitarian, democratic, responsible, and plural society, which does not become one only by losing its naturalness.

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[152] Day, *supra*, note 25 at 12.

[153] Per Brazilian Supreme Court Judge José Francisco Rezek, quoted in Brody, *supra*, note 29 at 5. My emphasis. See also Denning, *supra*, note 11 at 5. Compare 2.2.4. note 101.

What is here advocated for can simply not be attained in the present system even if "A democrat like myself"[154] were to inherit the powers under the system in place. Who may even prove that Paul Biya is not by nature democratic?[155] He might, indeed, have been one; but the system he inherited transformed him overnight. Certainly, the French-Ahidjo legacy is capable of changing anyone. The democratic Paul is now the totalitarian Saul.[156] The rationale for this is simple. Power corrupts. Its corrupting potential is directly proportional to the scope and concentration of the power. Unlike in Canada where mechanisms for checks and balances are in place, in Cameroon everything is in the hands of the President of the Republic who alone "define[s] the policy of the Nation".[157] By that very fact, he becomes, in addition to being the *Unholy Trinity*, chairperson of the only ruling political party, supreme judge, parliament, the state, the nation (and therefore national sovereignty). And all this, we are made to believe, is perfectly constitutional.

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[154] See "The Prosecutor is not Used to Democratic Procedures" *Cameroon Post*, *supra*, note 57 at 6 (Per Yondo Black). Compare the title of this article with note 56 above.

[155] See Delancey, *supra*, note 45 at 67, where he quotes *New Nigerian* (November 11, 1982) as cited in *Africa Research Bulletin* 19 (November 1-30, 1982), 6648, to this effect: "Therein lies Mr. Biya's problem. He has inherited a system he can't change. A whiff of democratic air and things fall apart. Ahidjo has certainly played his last political hat trick. Cameroon after him will determine whether he evolved a system to serve himself or his country."

[156] See, for example, G.C. Ntenga, "Who will Save Cameroon: Multipartism or God?" *Cameroon Post* (30 May-6 June, 1991), 6: arguing that as the *unholy trinity*, head of the judiciary, and head of the *parti unique*, when Biya takes one step forward to implement his new deal policy, "the selfish barons all stand up behind him and, in unison, drag him brutally two steps backwards, taking all precaution not to let him 'fall'." See also G.C. Ntenga "How Much Longer Will the New Deal Tango Last?" *Cameroon Post* (June 6-13, 1991), 10.

What then is proposed in replacement of the existing structures? A federal structure first and foremost. Not the farce of 1961, but a true federation with viable and solid democratic institutions such as parliamentary democracy with a bicephal executive and bicameral legislature, as well as a constitutional and pragmatic division of powers: not only between the three branches of state (which must themselves be distinct) but also between the federal and provincial (or state or cantonal) authorities. Once these are put in place, the foundation of judicial independence would have been firmly laid. All what would come thereafter would be mere decorations of, and ancillary to, that independence. The next two Chapters are devoted to these more fundamental devices.

One can only hope, therefore, that the struggle in Cameroon for democracy and liberalization continues to its positive end, namely, the building of a strong, federal, democratic, and egalitarian society, in which the rule of law reigns supreme. This would mean the existence of a third and indispensable branch of state power, the judiciary, *distinct* from the other two branches and having *power to review* their acts. These separateness and power of review are surveyed next.

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[157] See 2.2.3. notes 71 and 73.

CHAPTER FOUR

SEPARATION AND DIVISION OF POWERS AND ENTRENCHMENT OF JUDICIAL REVIEW

> *"[T]he liberty of the individual [lies] in the separation of powers- that is, in such an arrangement of the various institutions of government that each should prevent the other from having sufficient power to act tyrannically."* - H. Finer.
>
> *"When Chief Justice Marshall in 1803 read the doctrine of judicial supremacy into the 4,373 words of the Constitution of the United States he made it a living document and, at the same time, he made the Court the guardian of personal liberties. From that time to the present, that Constitution has been construed to mean that law is not merely to govern relations between man and man; it is to govern as well the government itself. Law applies to all persons, public or private, high or low, even to the President."* - Frank D. Day.

4.1.0. Introduction

As indicated earlier, the judiciary is one of the three arms of the modern state. The executive and the legislature are the other two. Among the main functions of the judiciary, as already noted in Chapter Two, are adjudication of cases, interpreting the law made by the legislature and checking abuse of power by the government generally, and by the executive branch in particular. Separation of powers and judicial review are inseparable, since there would hardly be any *judicial* review until the judiciary is distinct from the other branches of state power.

In this Chapter, we will focus more closely on separation of powers. But federalism and the parliamentary system of government will also be noted. (Canada- and not Cameroon- has both of these concepts.) Based upon these two concepts as well as the doctrine of the separation of powers, power is divided between various organs or offices of government. These concepts make the judiciary's independence possible. They also make judicial review inevitable. In this introduction, we will touch upon these two concepts of government before proceeding to a discussion of the separation of powers.

(a) Federalism: Federalism is a mode of political organization that unites separate states or other polities within an overreaching political system in such a way as to allow each to maintain its own fundamental political integrity.[1] Federalism not only separates executive power, for example, from the legislative and judicial, but also divides that power between the federal and provincial or state governments. The judiciary's independence and impartiality are greatly strengthened where there is non-concentration of powers. Decentralization of powers in political terms is properly instituted through the federal structure. Federalism apart, the concentration of powers in one person or office may not even be possible in the Canadian system due to its parliamentary system of government.

As will be seen further, Cameroon has failed to guarantee judicial independence. This failure is, in large measure, attributable to the fact that federalism was grossly distorted in 1961. Before the 1961 window-dressing exercise in Foumban, the delegations of both federating states knew pretty well that they were looking at the issue "from different sides of the gulf".[2] By still proceeding (for reasons best known only to them) to create a "unitary federation"[3], the parliamentary system of government which had previously existed was completely destroyed. The "unitary federation" swept away the last vestiges of any checks to the President's absolute governance, leaving no role for review by the Courts. For example, had the 1961-1972 experiment been a real or proper federation, the judiciary would have been both independent and very active in the life of the nation as is the case in Canada.[4] But as it was otherwise in Cameroon, the judiciary was not.

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[1] See *Encyclopedia Britannica* Vol.4 at 712-713.

(b) Parliamentary Democracy: The parliamentary system is not necessarily the best form of government.[5] But it provides a better system of protecting both the rights of individuals and state institutions especially when combined with federalism. This thesis has already recommended both federalism and

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[2] The Right Honourable Sir Kenneth Diplock, "The Courts as Legislators" (Address to the Holdsworth Club of the University of Birmingham, 1964) at 1.

[3] This is because "[i]n effect, the 1972 Constitution restores the *unitary* regime created in 1961 but with strengthened Presidential powers." Per V.T. Le Vine and R.P. Nye, *Historical Dictionary of Cameroun* (Metuchen, N.J: The Scarecrow Press, 1964) at 31. My emphasis. Le Vine and Nye even refer to the 1972 Unitary Constitution as "[t]he country's *third* basic document since *1960*" which "radically altered the structure of power and government": *ibid.* My emphasis.

[4] The role of the independent judiciary is especially pronounced in federal states (like Canada and the United States) in which the judiciary is also the umpire of federalism. The example of the Canadian Supreme Court that can be quickly cited is the decision in the *Patriation Reference: Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753. By this decision, "the Court destroyed the spectre of an unconstitutional constitution." Per P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 15. Hogg emphasizes, however, that the unconstitutionality would have been only in the conventional sense. See also E. McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982) at 80 & 87.

[5] See H. Berkeley, *The Power of the Prime Minister* (London: George Allen and Unwin Ltd., 1968) at 17.

parliamentary system for Cameroon.[6] Cameroon could graft other new elements onto the parliamentary system as has been done in Canada.[7] If this is done, it will go a long way toward promoting judicial independence. This results from the potential of the parliamentary system to further fragment power and authority and, thus, further diversify the power centres of government already created by federalism. This fragmentation and diversification of power are at the core of our emphasis in this Chapter.

In Canada's parliamentary system, the executive is *bicephal* and the legislature *bicameral*. These characteristics, *inter alia*, further ensure judicial independence and activism. The parliamentary system, therefore, further continues the division of governmental power (begun by the federal structure) by splitting and vesting the already divided power (at each level) in two different and distinct offices or organs or persons- the head of state (federal Governor General or in the case of the province, the Lieutenant Governor) and the head of government (Prime Minister or the Premier as the case may be). In the case of legislative power, the division is between two independent chambers,[8] namely, the Senate or upper chamber and House of Commons or lower chamber.

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[6] To this extent, the thesis may be recommending something else to a state that *must* remain unitary. There are differences between some of the deficiencies of the British Parliamentary cabinet and that of Canada. Canada has overcome or mitigated some of them solely on account of its federal character.

[7] See J.R. Mallory, *The Structure of Canadian Government* (Toronto: Gage Publishing Company, 1984) at 273. One of the most notable of these is the survival of third parties: unlike in both the U.K. and U.S.A. where they have withered and died. Their survival in Canada, Mallory says (at 222), is "a sign that Canadian politics is not the same as politics in the United States, and not a sign that our society is sicker." He gives their beneficent effects, as well as the reason for their survival at 223-224. Jeanne Kirkpatrick sees American impatience with complexities as a potentially dangerous phenomenon which explains the disintegration of party structure and the failure of much domestic policy over the last decade; this, she predicts, could ultimately change the shape of American institutions. See J.J. Kirkpatrick *Dictatorships and Double Standards- Rationalism and Reason in Politics*, as discussed in (1983) 15 *N.Y.U.J.Int'l L. & Pol.* No.2, 743 at 744.

Both of these arrangements can be viewed as reinforcing judicial independence, without which review by that branch would be inconceivable.

The principle of separation of powers requires that the main functions of government be assigned to different branches and that these branches be staffed by separate groups of state officials.[9] The power of the legislature to make laws for peace, order and good government or of the executive to enforce those laws does not entitle either of them to usurp judicial power. Any such legislative or executive usurpation is *ultra vires*.[10] And it is for the judiciary to make the declaration of what is *ultra vires*. When it does so, it exercises the power of review. This is the most important and continuing relationship that a court can have with other political institutions.

This Chapter will, consequently, contain two main parts. The first will examine separation of powers while the second will deal with judicial review, always bearing in mind, of course, their relatedness as indicated above.

A. SEPARATION OF POWERS

In this portion, an account of the origin and development of the principle of the separation of powers will first be attempted. Then we will look at the purpose or *raison d'être* of the doctrine. After that, we will examine the situation in Canada and Cameroon.

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[8] Some provinces have, however, abolished their Upper Houses.

[9] P.H. Russell, *The Judiciary in Canada: Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 89.

[10] C. Anyangwe, *The Magistracy and the Bar in Cameroon* (Yaoundé: CEPER, 1989) at 34.

4.1.1. Origin and development of the Doctrine

Courts in most political communities play a secondary role in governing. John Locke, who, according to Kenneth Holland, helped articulate the concept of the separation of powers for the modern world,[11] designated the three powers of government as legislative, executive and federative (this last being "the power of war and peace, leagues and alliances"). Locke spoke of the judicial function as part of the executive one and did not insist upon their separation.[12] As the old definition of executive included the judicial, the legislative-executive-judicial analysis of governmental activity of today was not generally accepted until the second half of the eighteenth century.[13] The separation of the king from the actual exercise of judicial authority was only effected after the Glorious Revolution of 1688 and the ensuing *Act of Settlement, 1701* which resulted in the statutory independence of the judiciary.[14]

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[11] For an elaborate discussion of the controversies surrounding the doctrine's origin, see W.B. Gwyn, *The Meaning of Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (The Hague: Martinus Nijhoff, 1965).

[12] K.M. Holland, "The Courts in the United States" in J.L. Waltman and K.M. Holland, eds. *The Political Role of Law Courts in Modern Democracies* (New York: St. Martin's Press, 1988), 6.

[13] Gwyn, *supra*, note 11 at 5.

For the most part, courts have resolved disputes in accordance with rules made by other institutions. But, because judges were regarded during the colonial periods as agents of the tyranny of the British crown, the eighteenth-century authors of the state and federal constitutions in the United States of America (U.S.A.) envisioned a limited role for courts.[15] Lord Hailsham of St. Marylebone in discussing Montesquieu's *l'Esprit des Lois* and the separation of powers, indicates that the Glorious Revolution gave birth to the doctrine although Locke pre-figured it. He criticizes both Locke and Montesquieu for misunderstanding the doctrine and, thus, misleading the American Founding Fathers. They, according to Lord Hailsham, were too bent on the past, forgetting the present and future.[16] But what is the whole *raison d'être* of the separation of powers doctrine?

4.1.2. Purpose of Separation of Powers

The main aim of the doctrine is to secure the liberty of the individual. State institutions of government must be arranged in such a way that each is in a position to prevent the others from having sufficient power to act tyrannically.[17] Separation of powers aims at maintaining checks and balances since the accumulation of the three powers in the hands of one person or group of persons (as is the case in Cameroon) is "the very definition of tyranny."[18] As noted in Chapter Three, when the English king exercised all of these powers, he was both judge and party in adjudication and, consequently, had no regard for the rights and privileges guaranteed by the law to the other parties. That being so:[19]

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[14] See **3.3.1.(a)** note 65. See also G.P. Bodet, "Introduction" in G.P. Bodet, ed., *Early English Parliaments: High Courts, Royal Councils, or Representative Assemblies?* (Boston: D.C. Heath and Company, 1968) at vii; and W. Stubbs, "The National Assembly of the Three Estates" in Bodet, *ibid.*, 1 at 2.

[15] Holland, *supra*, note 12. We have already noted in **2.2.2.** how this contributed to the Canadian court's docility.

[16] The Right Honourable Lord Hailsham of St. Marylebone, "The Separation of Power and the Office of the Lord Chancellor" (1989) 8 *Civil Justice Quarterly*, 308 at 308-09.

> [t]he Measure of his Justice would necessarily either Exceed, or be Defective, according to the Measure of his Love and Hatred, or supposed Love and Hatred, towards the Parties.

A prominent American judge very clearly described what the doctrine of separation is about and, conversely, what it is not about, in these lines:[20]

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy.

In short, the principle is an integral part of the rule of law. Checks and balances, the hallmark of separation of powers, were established in order to ensure that it should be a government of laws and not of men.[21]

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[17] See H. Finer, *The Theory and Practice of Modern Government* rev. ed.(New York: Holt, 1949) at 84. Also see D. Pasquet, "The Representatives as Tools of an Aspiring Autocrat" in Bodet, *supra*, note 14, 46; and K. Loewenstein, *British Cabinet Government* (London: Oxford University Press, 1967) at x-xi.

[18] Per James Madison, *The Federalist* Nos. 48 and 51, quoted in Gwyn, *supra*, note 11 at 3. See also P.W. Rodino, "Living with the Preamble" (1990) 42 Rutgers L. Rev. 685 at 695.

[19] R. Acherley, *The Britannic Constitution* (London, 1772) at 86, quoted in Gwyn, *ibid*. at 7. See also 3.3.0.

[20] Per Justice Brandeis (dissenting) in *Meyers* v. *United States* [1926] 272 U.S. 52, 293, quoted in Rodino, *supra*, note 18 at 494. Compare 3.3.2. note 27.

4.1.3. The Operation of the Principle in Various Countries

Though the parliamentary-cabinet system of government has been commended above for furthering the principle, it, in effect, "contradicts separation of powers"[22] by denying absolute separation between the Executive and the Legislature.

The United States has a rigid system of separation of powers. The executive and legislature in that country are supposed to have no connection whatever. The idea is that the executive should not be able to influence the legislature. That is, parties of the "King's friends", which occurred in England during the reign of George III should be avoided.[23]

The American system has been criticized by Lord Hailsham for its insistence on rigid separation. First, the President in the United States appoints and dismisses cabinet just as the King did; and, moreover, he is armed with legal powers almost exactly comparable to those accorded to William of Orange. Second, the 1688 Revolution led to the demise of the theory of the monarchy's divine rights, ushering in the bicephal executive; but the U.S. presidential system, surprisingly, maintains a monocephal executive. The bicephal executive secures more judicial independence than the monocephal one.[24] The third criticism is that both Houses of legislature are independent of one another in Britain (and Canada); but this is not exactly the case in the USA.[25]

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[21] Rodino, *ibid*. See 1.1.1.

[22] Lord Hailsham, *supra*, note 16 at 309. See also Russell, *supra*, note 9 at 89; Chief Justice B. Dickson, "The Rule of Law: Judicial Independence and the Separation of Powers" (Address to the Canadian Bar Association, August 21, 1985) [Unpublished] at 5. These powers (the executive apart), as noted particularly in Chapter Three, do not even exist as separate powers in Cameroon. See *The Canadian Bar Association and the Cameroon Bar Council Committee Report: Model Human Rights Charter for Developing Countries 1989* (Ottawa: Canadian Bar Association, 1989) [hereinafter CBA/CBC Report] at 27.

[23] See Mallory, *supra*, note 7 at 6.

However, the English judiciary, as Lord Hailsham indicates, has a monopoly on interpreting the law (both customary and statute). It, therefore, has a certain supervisory power[26] of determining the legality of the actions of subordinate bodies, including Ministers, but not to strike down, as unconstitutional, Acts of Parliament themselves.[27] Lord Hailsham's conclusion is that though this British arrangement would normally not be accepted by the American courts, Montesquieu, or others as legitimate, "the British are at home with it since 1688."[28]

The separation principle, however, applies in Canada much more to the judiciary and its relationship with the other branches of government. This principle is a corollary of judicial independence: the judiciary would not be independent if the primary judicial and executive functions were carried out by the same officials[29] as is the case in Cameroon. Professor Russell indicates that Canada has moved a long way from the overlap that existed in colonial Canada,[30] toward separating the judicial personnel from the executive and legislative institutions.[31]

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[24] President Roosevelt's attempt to pack the court (if Congress did not stand firm against it) is illustrative here. This should immediately tell the story in Cameroon where nothing like the Congress exists even though it claims to be "presidential". It is submitted that "presidentialist" instead should be the description of Cameroon's system.

[25] Hailsham, *supra*, note 16 at 309.

[26] See Order 53 R.S.C.

[27] In this, they differ from their Canadian counterpart. Review in Canada extends even to the legislature's acts. See *Ottawa Valley Power Co.* v. *Hydro-Electric Commission* [1936] 4 D.L.R. 594 (Ont. C.A.); and *Manitoba (Attorney General)* v. *Canada (Attorney General)* [1981] 1 S.C.R. 753, [1981] 6 W.W.R. 1.

[28] *Supra*, note 16 at 310. This becomes even more evident after reading 5.1.1. and 5.7.2.(b) (note 143ff.).

But it is still the case in Cameroon where non-separation has instead intensified, though Dr. Anyangwe would use the restrictive phrase "in francophone Cameroon."[32] There is, no doubt, "constitutional" separation of domains;[33] but, as already seen, this is no more than Day's "paper system".[34] Most Canadians now vigorously object to the mixture of executive and judicial authorities because they have come increasingly to see the judiciary as a check on both the executive and legislature.[35] Thus, it is simply absurd for such an organ to be part of those other organs it is meant to check.

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[29] See Justice Dickson, *supra*, note 22 at 6. See also **3.3.0.**

[30] Some scholars have explained this phenomenon, rife in the colonies, on the fact (1) that some of these noble ideas were left back at home by the colonial masters as they (the ideas) could, on occasions, undermine their (colonial masters') purposes, and (2) to cut costs and ensure total obedience, colonial administrators acted as magistrates as well. See M.K.B. Wambali and C.M. Peter, "The Judiciary in Context: The Case of Tanzania" in N. Tiruchelvam and R. Coomaraswamy, eds. *The Role of the Judiciary in Plural Societies* (New York: St. Martin's Press, 1987), 131 at 133.

[31] *Supra*, note 9 at 90.

[32] *Supra*, note 10 at 42. The question that is posed is: What precisely is "francophone Cameroon" in a *unitary* Cameroon with a unified justice system and with no developed system of private international law?

[33] See demonstration in 3.3.0. between notes 36 and 41.

[34] See F.D. Day, *Criminal Law and Society* (Springfield, Illinois: C.C. Thomas, 1964) at 11.

With the Canadian *Charter*, judges' off-the-bench collaborative activities[36] have greatly decreased because judicial independence and separation from government are of the utmost importance "[n]ow that the judiciary is charged with the task of resolving disputes arising between the individual and the government concerning fundamental rights and freedoms."[37] This entails that the Courts are more concerned with scrupulously scrutinizing and reviewing legislative and executive acts.

B. JUDICIAL REVIEW

In this portion of the Chapter we will begin with the meaning of judicial review, and then look at the growth and use of judicial review in different countries. We will then see how judicial review can be justified before examining it in Canada and in Cameroon. In the final section we will squarely face the problem of *un gouvernement de juges*, which will conveniently carry this Chapter into the next one.

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[35] Russell, *supra*, note 9 at 90. See also Dickson, *supra*, note 22 at 9. Compare **3.2.2.**

[36] Such activities refer to the participation of judges in extra-judicial functions (executive in particular). See Russell, *ibid*. at 90 & 89; Dickson, *ibid*. at 22-23; and J. Deschênes, "Le Role Legislative du Pouvoir Judiciare" (Address to the Chamber of Commerce of Montréal, October 29, 1974) [Unpublished] at 5-6. See also **2.2.1.(b)**; **2.2.1.(c)** and **2.2.2.** Judges in Cameroon are involved is such activities. Moreover, judicial authority in Cameroon is often vested in persons or authorities other than the courts. See Anyangwe, *supra*, note 10.

[37] Justice Dickson, *ibid*. at 11. See also M. Gold, "Constitutional Scholarship in Canada" (1985) 23 Osgoode Hall L.J. No.3, 496 at 501-502; and Russell, *ibid*. at 90.

4.2.0. Defining Judicial Review

Judicial review is the power to invalidate acts of legislators and executives. It is the most important and continuing relationship that a court can have with other political institutions.[38] The scope of judicial review makes the Supreme Court of any country a centre of political power.[39] Russell defines this review as the power of the courts to veto legislation or executive activities which, in the judiciary's view,[40] violate the law of the Canadian Constitution. He then concludes that, though not expressly established in the Canadian Constitution, the power of review has been exercised since the country's earliest days.[41]

The scope of a court's authority is akin to the legal idea of "jurisdiction" with a political accent. But what is the depth of their authority in areas they touch? Do they have a lot of control over the area they deal with, or do they share authority with other institutions?[42] Some of these questions may be answered by looking at the growth and use of review in some countries. This will also help us to understand why some courts are unlike the others in this field, as the references in the last note demonstrate. It will as well indicate to Cameroonian judges (in particular) and the public generally, that they need not sit back and hope that this "manna" of review will fall from heaven.

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[38] J.L. Waltman, "Introduction" in Waltman and Holland, *supra*, note 12 at 5. Constitutions express the "positivization" of higher values and judicial review is the method of rendering these values effective. See M. Cappelletti, *Judicial Review in the Contemporary World* (New York: The Bobbs-Merrill Company Inc., 1971) at vii, x.

[39] See R. Coomaraswamy, "Toward an Engaged Judiciary" in Tiruchelvam and Coomaraswamy, *supra*, note 30, 1 at 2. See also 1.1.3. note 26.

[40] And not in the view of the President of the Republic as in Cameroon. See 2.2.3. note 85.

[41] *Supra*, note 9 at 93. See also Hogg, *supra*, note 4 at 93-100. See 2.2.1.(b) and 2.2.2.

[42] Waltman, *supra*, note 38 at 4. See 2.2.2. and 2.2.1.(b) on the one hand; and 2.2.3. and 2.2.1.(a) on the other.

4.2.1. The Growth and Use of Judicial Review in Different Countries

As far back as 1832, Alexis de Tocqueville noted that the power of review had given courts in the United States a unique role:[43]

> An American judge can pronounce a decision only when litigation has arisen, he is conversant only with special cases, and he cannot act until the cause has been duly brought before the court. His position is therefore exactly the same as that of the magistrates of other nations; and yet he is invested with immense political power. How does this come about? If the sphere of his authority and his means of action are the same as those of other judges, where does he derive a power which they do not possess? The cause of this difference lies in the simple fact that the Americans have acknowledged the right of judges to found their decision on the Constitution rather than on the laws. In other words, they have permitted them not to apply such laws as may appear *to them* to be unconstitutional.

Because the power of judicial review is a firmly entrenched component of popular legal culture of the United States, courts participate as an integral partner in the policy-making process. The fragmentation of policy-making, as noted in Chapter Three, is one of the distinctive traits of the U.S. political system, which provides numerous points of access for interest groups.

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[43] Alexis de Tocqueville, *Democracy in America* Vol.I (New York: Alfred A. Knopf, 1945 [1835]), chapter 6 at 104, quoted in Holland, *supra*, note 12 at 12. My emphasis to draw attention to note 40 above.

However, because courts sustain most challenged governmental actions, they are also one of the principal sources of governmental legitimacy and political stability.[44] The obvious astonishment of people not acquainted with the U.S. system has been registered:[45]

> What a foreigner has the greatest difficulty in understanding in the United States, is the status of the judiciary. There is hardly any political controversy wherein he does not hear the authority of judges invoked; and he naturally concludes that in the United States, the judge is a powerful political figure. However, when he proceeds to examine the constitution of the courts, he does not find there, at first inspection, anything other than the usual judicial power. It appears to him therefore, that judges never become involved in political questions other than by the purest chance; but this same chance seems to occur every day.

The process of constitutional development in the United States has continued unabated through the institution of judicial review. Yet:[46]

> it is not entirely clear on what standards this judicial review is based today, what its methods and limits are, or what, if any, norms or substantive values judicial review in the United States is charged to effect.

In Canada, the power of the judiciary to veto laws or executive acts which violate the Constitution has become constitutionally entrenched. Judicial decisions and the constitutional supremacy clause[47] give this power of judicial review a firm basis in Canada.[48] Russell, however, indicates that the new supremacy clause does not state that the judiciary is the authority that must decide in case of dispute whether or not a law is inconsistent with the constitution.

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[44] Holland, *ibid*. at 27. Contrast this with 3.3.0. note 34.

[45] De Tocqueville, *supra*, note 43, quoted in D. Radamaker, "The Courts in France" in Waltman and Holland, *supra*, note 12, 129. "No one coming from a system in which parliamentary sovereignty has stultified creative legal constitutional thinking can fail to be moved intellectually and otherwise by the unfolding history of the American Constitution." Per L.W.H. Ackermann, "Constitutional Protection of Human Rights: Judicial Review" (1989) 21 Colum. Hum. R. L. Rev. No.1, 59 at 70.

[46] Ackermann, *ibid*.

But, as pointed out in Chapter One, the supremacy of the Constitution implies the existence of some independent and impartial organ. Again, Chapters Two and Three have indicated that the role is that of the judiciary; and that judges must not wait to be told when to perform their functions. This is because in every legal system:[49]

> there must be a basic rule or rules for identifying a valid piece of legislation, whether we call it the grundnorm, like Kelsen, or the ultimate legal principle, like Salmond, or the rule of recognition, like Professor Hart. This grundnorm, or whatever we call it, *lies in the keeping of judges and it is for them to say what they will recognize as effective legislation*. For this one purpose Parliament's powers of giving orders to judges are ineffective. It is futile for Parliament to command judges.

Canada respects this because:[50]

> by now [in Canada] the judiciary's power to make these determinations and override legislation that conflicts with the Constitution is well established [as even] before 1982 when

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[47] See section 52(1) of *Constitution Act, 1982* which declares the Constitution of Canada to be the supreme law of Canada, making any law inconsistent with it "of no force or effect".

[48] See 3.2.0.

[49] H.W.R. Wade, *Constitutional Fundamentals* (London: Stevens and Sons, 1980) at 26. My emphasis, again for note 40 above. Wade's "Parliament" must be substituted (for Cameroon) with "the President of the Republic".

[50] Russell, *Supra*, note 9 at 93. See, for example, *supra*, note 27.

governments attempted to prevent the courts from reviewing the constitutional validity of legislation, the courts ruled that they could not do so.

The popular belief in a law higher than man-made rules reinforces the power of judicial review. The American Declaration of Independence speaks of "the laws of Nature and of Nature's God" and traces a person's "unalienable Rights" to the beneficence of his "Creator".[51]

However, in the civil law world, the nineteenth century was heavily influenced by positivist thought, which resisted any attempt by the judiciary to impose "higher" or "constitutional" standards on ordinary legislation. The popular legislature was, therefore, seen as the only source of law, and its statutes were to control all cases brought before the courts. Nevertheless, when the Nazi-Fascist era shook this faith in the legislature, people began to reconsider the judiciary as a check against legislative disregard of principles once considered as immutable. They began, in a sense, to "positivize" these principles, to put them in written form and to provide legal barriers against their violation.[52]

The process of providing these legal barriers took place in three stages. First, there was the written constitution codifying individual and social values. But the existence of a written constitution should not be taken to mean that there is judicial review. For example, although countries of the "Romano-Germanic family" have written constitutions, they do not still all recognize the doctrine of judicial review. The Netherlands does not, and France does so only in the limited sense that the *Conseil d'État* may test the constitutionality of a statute *before* it comes into force. Switzerland recognizes it insofar as the federal court may test the constitutionality of canton statute against federal law, but not the constitutionality of the federal law itself.[53] We can also cite the Cameroonian constitution which includes the separation of powers but ends up creating a mere "paper system".

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[51] Holland, *supra*, note 12 at 9. This contrasts vividly with **3.3.1.(b)** note 62.

[52] Cappelletti, *supra*, note 38 at viii, 97. See **1.1.1** and **1.1.2.** It is not exactly clear why there should be faith in the judiciary and not in the legislature especially as the former could easily be packed. The rationale may be, as we saw in Chapter Two, that the two institutions must not be mutually exclusive in the matter.

The second stage concerns the rigidity of these constitutions. But in Cameroon, the president alters his "framed" constitution in any way he likes. Finally, there were provisions of means for guaranteeing the constitution, separate from the legislative power itself and embodied in the active work of the judges or of some special constitutional court (like in France[54]). This active work of the judiciary makes the vague terms of constitutional provisions concrete and gives them practical application because through it the ineffective and abstract ideals of natural law are synthesized with the concrete provisions of positive law in the framework of modern constitutions.[55] These accounts smoothly carry us into the justification or rationale for having judicial review.

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[53] Ackermann, *supra*, note 45 at 60. See also R. David and J.E.C. Brierley, *Major Legal Systems in the World Today*, 2nd ed. (London: Stevens and Sons, 1978) at 99- 101.

[54] As to more of which, see later (4.3.1.(a)).

[55] Cappelletti, *supra*, note 38 at viii.

4.2.2. Justifying Judicial Review

The rationale for judicial review and for the supremacy of the Constitution was authoritatively stated by Chief Justice Marshall in *Marbury* v. *Madison*[56]. The Constitution, Chief Justice Marshall declared, is either a superior paramount law, unchangeable by ordinary means, or it is not. And if it is, it is alterable only when the legislature (and not the president) pleases to alter it. A constitution, to merit its name, must, it is submitted, belong only to Marshall's first category, with the Courts being its guardian.

Thus, when Chief Justice Marshall in 1803:[57]

> read the doctrine of judicial supremacy into the 4,373 words of the Constitution of the United States *he made it a living document and, at the same time, he made the Court the guardian of personal liberties*. From that time to the present, that Constitution has been construed to mean that law is not merely to govern relations between man and man; it is to govern as well the government itself. Law applies to all persons, public or private, high or low, even to the President.

Judicial review of the constitutionality of legislation, however, remains an enigmatic institution and presents an exciting and perplexing encounter between legislator and judge, between statute and judgment.[58] This is because, while it can only operate in democratic societies, at times it frustrates the will of the majority.[59] In such cases, court decisions, while pre-eminently political, are made by people not themselves responsible to the electorate.[60]

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[56] (1803) 5 U.S. 137 (1 Cranch).

[57] Day, *supra*, note 34. My emphasis to draw attention not only to note 40 above but also to 3.3.0. notes 31 to 40.

[58] See 2.2.1. generally.

Social action litigation, as noted in Chapter Two, envisages a more fundamental reappraisal of the role of constitutional adjudication and of the lawyering process, which is specific to the condition of "governmental lawlessness" when it prevails in a country. For example, judicial review in India grew out of the trauma of the Emergency in the country coupled with efforts to provide a new moral basis for the legitimation of judicial power.[61] It was also necessary to forge links with social activists and investigative journalists in arousing the public's conscience on the atrocities against untouchables and tribals, custodial violence in prison and other detention centres, and extra-judicial killings. The most important matter that confronted the Indian Court related to the development of legal doctrines that would expand the frontiers of fundamental rights and social justice.[62] Consequently, new concepts of administrative law were evolved to facilitate judicial scrutiny of executive actions on the ground of reasonableness, and the "court arrogated to itself the awesome 'constituent power' even of reworking and rewriting the provision of the Constitution".[63] And this, it must be emphasized, was done by the Court despite the increasing resistance from the State administrations. Thus, because of the activities of public interest groups and civil rights movements, questions of judicial review and judicial activism have become the most interesting areas of litigation before the judiciary. Constitutional litigation differs from other appellate court issues as the act of interpretation often involves a statement or exercise of power.[64]

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[59] For further shortcomings of the institution, see P.M. Maduna, "Judicial Review and Protection of Human Rights Under a New Constitutional Order in South Africa" (1989) 21 *Columbia Hum. R. L. Rev.* No.1, 73 at 78-81. Some are implicit in note 43 above and most have been explicitly recognized and stated by Diplock and Baxi in **2.2.1.(b)**. For an extensive analysis of how alternative theories (interpretivism, noninterpretivism) of judicial review wrestle with the dilemma of judicial choice in a democracy, see P.R. Dimond, *The Supreme Court and Judicial Choice: The Role of Provisional Review in a Democracy* (Ann Arbor: The University of Michigan Press, 1989) at 5-11. (His proposed theory of "provisional review" (at 11-18), advanced as a solution, is discussed later in **4.3.3.(b)**) See also H.S. Commager, *Majority Rule and Minority Rights* (Gloucester, Mass.: Peter Smith, 1958), chapter 2.

[60] See Dimond, *ibid.* at 1-3, 4, & 154; and Cappelletti, *supra*, note 38 at 1, 85, & 98. This factor haunts a democracy. In Canada, for example, the Triple-E Senate has been advocated "because it [the present appointed senate] lacks the legitimacy of an elected body." See "The Canadian Question (IV): Democratic Reform" *The Globe and Mail* (Toronto) (September 19, 1991) A18. One would then greatly wonder what to make of Cameroon where no public official whatever (from the most insignificant of them passing through provincial governors to whichever you can name) is ever elected. Unquestioned, unreviewable, unfettered, unencumbered (and all the other *un*'s you can name) presidential appointments from *A* to *Z* are the order of the day. See M.W. Delancey, *Cameroon: Dependence and Independence* (Boulder: Westview Press, 1989) at 57; and later (**5.3.3.** note 61).

[61] N. Tiruchelvam, "Introduction" in Tiruchelvam and Coomaraswamy, *supra*, note 30 at xii.

There is then no reason why there should be fear of "political" action on the part of the Courts "if the act of constitutional interpretation is an act of power."[65] Why should judges even be horrified at the prospect of having to judge the constitutionality of Acts of Parliament if they should be called upon to do so under a Bill of Rights or a constitution settlement?[66] Here lies the proof of Lord Denning's statement that the "more one thinks about the administration of justice, the more one realises that it depends on the qualities of the... [people] who are ready to undertake it."[67] The stories of John Marshall and of Chief Justice Coke in Chapter Three have already been related. Maduna, too, has stated very clearly that judicial review "depends to a great extent on the political, social and economic values of those who wear the judicial robes."[68] Thus, it is the minds of the judges which require adjusting; so, to have statutes which merely tell them that they are independent is futile.[69]

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[62] *Ibid.*

[63] *Ibid.*

[64] Coomaraswamy, *supra*, note 39 at 3.

[65] *Ibid.*

[66] Wade, *supra*, note 49 at 77.

As has been indicated, an appellate court may genuinely attempt to "interpret" a given situation with regard to the intention of a legislature; but constitutional cases involve issues in which the legislature's point of view is only one aspect of the judgment. "The Court's interpretation of the fundamental law of the land must prevail over the expectations of any given legislature."[70] This brings to mind Justice Holmes' remark noted in Chapter Two that "[w]hoever hath absolute authority to interpret any written or spoken law, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them". Who, then, has this absolute authority in the societies under discussion?

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[67] A.T. Denning, *The Road to Justice* (London: Stevens and Sons, 1955) at viii. Thus, with conservative judges in the majority in the U.S. Supreme Court, there were decisions such as *Dred Scot* v. *Sandford*, (1857) 60 U.S. (19 How.) 393 (which took a civil war and a constitutional amendment for a reversal); *Lochner* v. *New York* (1905) 198 U.S. 45; and *West Coast Hotel* v. *Parish* (1937) 300 U.S. 379 (these last two required, a depression, the New Deal, Roosevelt's attempt to pack the Court, a new breed of criticism called "legal realism", and the continued onslaught of all variety of federal and state regulatory legislation before a majority of the Justices finally ceased reviewing the substance of economic and social welfare laws under the due process clause). See Dimond, *supra*, note 59 at 7-8. For a similar conservatism in the Canadian Supreme Court, see C. Baar, "The Courts in Canada" in Waltman and Holland, *supra*, note 12, 53 at 55. [2.2.2.]

[68] *Supra*, note 59 at 79. "The quality of our judges is the quality of our justice...": Professor R.A. Leflar, "The Qualities of Judges" (1960) 35 *Ind. L. J.* 289 at 305. See also M. Rosenburg, "The Qualities of Judges- Are They Strainable?" in G.R. Winters, ed., *Judicial Selection and Tenure* (Chicago: The American Judicature Society, 1973), 1.

[69] See Wade, *supra*, note 49 at 37. Compare notes 50 and 39 above.

4.3.0. The Canadian Position on Judicial Review

As noted in Chapters Two and Three, there has been a strong tradition of judicial review in Canada even before the *Charter*; and this extends to the Legislature itself.[71] We need not spend much time on the situation in Canada. The Supreme Court clearly stated in the *Manitoba Reference*:[72]

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s.52 of the Constitution Act, 1982 declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

Cameroon, unfortunately, takes just the contrary view and does not share these attributes of both the constitution and judiciary. Let us see to what extent it differs from Canada, and who, in its estimation, "hath absolute authority to interpret any written or spoken law".

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[70] Coomaraswamy, *supra*, note 39 at 3. This accords with note 49 above.

[71] See also Justice Dickson, *supra*, note 22 at 7-8, 9, and 10. This is unlike in Britain (note 27 above).

[72] Rendered June 13, 1985, quoted in Justice Dickson, *ibid* at 9-10.

4.3.1. The Cameroonian Position on Judicial Review

In the constitutional system of Cameroon, as noted in the last Chapter, there is no form of control over the constitutionality of laws as exists in Canada and other countries[73] even though the monitoring of the constitutionality of laws is such an essential feature of *une société politique dite démocratique*. We already know what life looks like without such control by an independent judicial authority.[74] Stated briefly, *dans ce pays-là, c'est "Le Président de la République, Chef de l'État et Chef de gouvernement"* and not the Courts (as in Canada and elsewhere) who, alone, "*veille au respect de la Constitution*".[75] There are not even "ouster clauses" in the Republic of Cameroon, as there are in Tanzania,[76] because the executive has no fear whatsoever of the courts in the country. These courts, as we mentioned in Chapter Two, have never opposed the government's lawlessness in any way when the occasions have arisen to do so. Just one or two cases here will help make this point clear.

In *l'Affaire Société de Grands Travaux de l'Est (SGTE)* c. *État du*

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[73] See CBA/CBC Report, *supra*, note 22 at 25. See **3.3.0.**

[74] See **3.3.0.** note 36.

[75] Article 5 U.C. See also 3.3.3.; 2.2.3.; and 2.1.3.

[76] As to which, see Wambali and Peter, *supra*, note 30 at 140. These are express clauses in legislation ousting the court's jurisdiction in certain specified matters. Compare section 17 Constitution of the defunct West Cameroon. It was, indeed, the President of the Federal Republic who played the effective role the Senate and Courts play in other polities. Section 17(7) even declared that when "a bill is presented to the President [of the federal republic] in pursuant of this section, it shall bear a certificate of the Speaker of the House of Assembly [i.e., the Lower House] that this section has been complied with and the certificate shall be *conclusive for all purposes and shall not be questioned in any court.*" My emphasis.

Cameroun,[77] the Supreme Court decided the case as we already know.[78] The two grounds of the decision will simply be termed here "the competence" and "the preamble" grounds.[79] These are, to my mind, devastatingly far-reaching grounds upon which to base decisions of constitutional litigation. They deserve a lengthy appraisal.

4.3.1.(a) The Challenger's Competence

On this first ground justifying that court's decision, we need not expend much time as it has already been sufficiently canvassed in the discussion above as well as in Chapter Two. It is absurd for the President of the Republic to be the sole judge of whether or not the constitution has been violated by legislation, especially as he is the sole legislator. If we define "constitutional justice" as that condition in which citizens may trust their government to uphold certain rights considered inviolable, then judicial review of statutes is only one way of attaining that happy state.[80] Since Cameroon heavily draws from French law, it would be important to note the French position on this issue of constitutionality.

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[77] See **3.3.1.(b)** note 77. For more of the cases, see Anyangwe, *supra*, note 10 chapter 3 titled "Judiciary in Politics" (i.e. in federal epoch).

[78] **3.3.1.(b)** notes 78 to 79. See also **3.3.0.** note 34.

[79] It should be noted that the events of the case arose in the federal epoch (in which the matter was covered by article 1 of that epoch's constitution) though the final decision was rendered when the unitary constitution had replaced the federal. Article 14 F.C. was in the same terms as seen in **2.2.3.** note 85.

[80] Cappelletti, *supra*, note 38 at 2.

In France, there is no judicial control,[81] although there is, at least, political control of constitutional validity.[82] French constitutions have always denied the power of judicial review for historical and ideological reasons. The 1958 French Constitution-"*dont s'inspire fortement notre droit constitutionnel*"[83]- does not grant judges a general power to review the constitutionality of legislation. Instead, there is the *Conseil Constitutionnel* established by the subsequently modified "*l'Ordonnance*" of 7th November 1958, and which is composed of all ex-presidents of the Republic and nine more members.[84] That *Conseil* has as one of its functions "*le contrôle de la constitutionalité des lois.*"[85] However, this *Conseil*:[86]

> was an invention of De Gaulle, an expression of that powerful individual's determination to govern France unencumbered by the parliamentary factionalism which had resulted in the total paralysis of the government of the Fourth Republic[[87]] at the moment of

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[81] See, however, Dallis Radamaker, *supra*, note 45 at 129.

[82] See Cappelletti, *supra*, note 38 at 2-5.

[83] P-G. Pougoué and M. Kamto, "Loi No. 89/018 du Juillet 1989 Portant Modification de la Loi No.75/16 du 08 Décembre 1975 fixant Procédure et le Fonctionnement de la Cour Suprême" (Janvier-Février-Mars 1990) *Juridis Info* (*Revue de la Legislation et Jurisprudence Camerounaise*) No.1, 5 at 8. *Translation*: "from which our [Cameroonian] constitutional law greatly draws". The full significance of the professors' statement is got by reading *infra*, text to note 86.

[84] Three of whom are nominated by the President *de la République*, three by the President of the *Assemblée Nationale*, and three by the President of the *Sénat*.

[85] See Cappelletti, *supra*, note 38 at 3.

[86] Radamaker, *supra*, note 45 at 140.

[87] This may lend credence to Mallory's assertion that unless there is a strong bond holding king, Lords and Commons together, the British parliamentary Cabinet system of government is essentially unstable: *supra*, note 7 at 6. But it must be stressed that such a bond does not require an unconstitutional and unbalanced constitution. A strong king, no doubt, "must be the king of a united people; [but] a people to

> the Algerian crisis. The constitution of 1958, tailor-made, as it were, for De Gaulle, limited the sovereignty of Parliament, not *vis-à-vis* the citizens by subjecting legislation to review for conformity to libertarian norms, but rather in relation to the executive branch of government.

That *Conseil* should, therefore, be regarded as more of a mechanism for subordinating Parliament to the will of the executive rather than one of playing the role assured to Courts in the Anglo-American tradition. The statement of Professors Pougoué and Kamto that Cameroon's constitutional law is strongly influenced by this French Constitution should be taken seriously.

Moreover, since the French *Conseil* may not be convened on the initiative of private parties[88] but only on that of a few specified political figures,[89] it has been pointed out that:[90]

> *...si le Parlement et le Gouvernement (y compris le Président de la République) s'entendent pour violer la Constitution, le Conseil Constitutionnel est impuissant.*

An important reform was made in 1974. This resulted almost immediately in an increased activity of the *Conseil*: now its jurisdiction can be

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be united, must *possess a balanced constitution, in which no class possesses absolute and independent power, [for] none is powerful enough to oppress without remedy.*" Per Pasquet, *supra*, note 17. My emphasis.

[88] Just like article 10 of Cameroon's constitution being discussed. In France, however, the three presidents (of republic, of assembly, and of *sénat*) are entitled to convene the *Conseil*. This is very unlike in Cameroon where none of the plethora of presidents (see 3.4.2. note 140) can do the same.

[89] Who will usually belong to same majority which passed the challenged legislation, and having "no special claim to a particular competence in constitutional matters and only occasionally having a legal education": Radamaker, *supra*, note 44 at 140.

[90] Francine Batailler, *Le Conseil d'État Juge Constitutionnel 17* (Paris: Pichon et Durand-Auzias, 1966) at 35, quoted in Cappelletti, *supra*, note 38 at 5. *Translation*: "The Conseil is powerless in the event of both Parliament and government agreeing to violate the constitution".

invoked whenever at least sixty members of the National Assembly or the *Sénat* agree.[91] Nevertheless, this is still restrictive, in the sense that it would be very difficult to have that number of senators or parliamentarians agree, especially as France has the party system. But it becomes the best choice when put alongside the Cameroonian version where the President of the Republic (as the sole legislator) is also the only competent person to challenge his own legislation.

Should the President surprise everyone by challenging his law (as per article 10), would the country's "chained, mangled, ineffective" Supreme Court invalidate such retrospective legislation, or would it still hold that the legislation is valid on the ground that it only violates the preamble?

4.3.1.(b) La Valeur Constitutionnnelle du Préambule

Professors Pougoué and Kamto affirm that "*le principe de la non-rétroactivité des lois a été affirmé par le constituant camerounais de 1972.*"[92] They then set out to demonstrate whether or not "*la reforme [est] contre la constitution*";[93] but, unfortunately, end up confusing the judges more. They blame the latter without, in the least, indicating a clear path the judges ought to have taken or must follow.[94] Having vehemently criticized these professors,[95] we believe the courts must be assisted in how to go about their business. They must be shown just how to give "*une lecture courageuse de la Constitution*" in such cases because doing so will be "*d'un grand secours à cet égard.*"[96] The better way of helping these judges to perform their duty as is expected of them will be to lay bare the positions in both legal systems inherited by Cameroon- civil law and common law. We will begin with the actual situation of preambular paragraphs in French law.

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[91] Radamaker, *supra*, note 45 at 141.

[92] Their stance on that constitution in its entirety has already been canvassed in 3.3.1.(b). We need to simply add that "[t]he most tragic fate that can befall a people is their psychological acceptance of defeat or abdication to a subordinate role in society." Per M.L. Lokanga, "The Second Fiddle Syndrome" *Le Messager* (6 June 1991), 17.

[93] *Supra*, note 83 at 7.

4.3.1.(b)(i) En Droit Français (Civil Law)

"*Le principe fondamental,*" pursue Professors Pougoué and Kamto, "*de la non-rétroactivité des lois est inscrit dans les constitutions successive du Cameroun, sauf la 'Constitution' fédérale du 1er septembre 1961, si du moins l'on considère qu'elle n'avait pas de préambule.*"[97] After citing numerous cases[98] and saying all what we have already stated,[99] Professors Pougoué and Kamto suggest, however, that the preamble is not denied all constitutional authority by that decision because, by insisting on the incompetence of SGTE to challenge the constitutionality of the law, the court implicitly recognizes that it would have upheld the preambular principles if the only competent person to challenge their violation did so.[100] It is submitted that their view clearly misses the point.

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[94] See 3.3.1.(b).

[95] *Ibid.*

[96] See *ibid.* note 88.

[97] Pougoué and Kamto, *supra*, note 83 at 7. They are simply saying that the 1961 constitution had no preamble; and those that do, have the non-retrospection principle in it.

[98] As to these cases which unequivocally stated the constitutional value of the preamble of that French Constitution, see Radamaker, *supra*, note 44 at 142.

[99] 3.3.1.(b) notes 80 to 81.

First, were that to be the case, the court would simply have decided the case on the ground of competence alone without even going into the question of the preamble. Second, after having authoritatively stated the "Cameroon law on the preamble", the court went further to decide on the competence of the challenger. This second issue is completely independent of the first, and was advanced preparation for any future case that would arise not in the preamble but the concerning the articles themselves. Though it is hard to see just how any human rights action can ever be founded on that constitution, since such principles "*dans la Constitution de 1972...ont été refoulés dans le préambule.*"[101]

Thus, we see that the ground of competence did not arise as an alternative to the preamble ground, but as an independent ground. For example, we may cite two other *arrêts de la Cour Fédérale de Justice, Chambre administrative de Yaoundé.*[102] The cause in these two cases was based on article 1 of the Federal Constitution which, as noted, had no preamble and proclaimed federal Cameroon's attachment to fundamental liberties.[103] The judge still dismissed the cause because no competence of challengers was established (as per article 14 of the federal constitution). These were cases of Jehovah Witnesses who challenged the constitutionality of a decree which had dissolved and proscribed their group worship. Commenting on the decision of these latter cases, Pougoué and Kamto made the declaration which has already been given.[104]

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[100] *Supra*, note 83.

[101] *Ibid*. Translation already given in **3.3.1.(b)** note 92.

[102] *Arrêt No.178 du 29 Mars 1972, Mouelle Koula Eitel* c. *République du Cameroun* c. *République Fédérale du Cameroun*; and *Arrêt No.194 du 25 Mai 1972, Nana Tchana Daniel Roger c.R.F.C* [Jan.-Déc.1973] *Récueil Camerounais de Droit* No.3 at 54.

The Cameroon court, unmistakably, shied away from its responsibilities in the same way that its counterpart in Ghana had done one decade before it. On 28 August 1961 the Ghana Supreme Court ruled that the country's *Preventive Detention Act* was still valid even though it conflicted with the solemn declaration of fundamental human rights made by late President Nkrumah on assuming office. The Court capitulated from its duty when it held that the people's remedy for the derogation "is through the ballot box and not through the Courts."[105] The Ghanaian Court might just have added that, where the ballot-box is left unused, it may be only a matter of time before the ballot itself is no longer available. This is because:[106]

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[103] See Chapter Three notes 32 & 34. Neville Rubin has conveniently shown how this constitution did not provide for the enforcement of fundamental rights, and concluded that this particular phrase on human rights "was inserted as a substitute for any substantive provision on the subject, [t]he only other references to the matter...[being] those in article 6...which makes 'human rights' a federal matter, and Article 24..." *Cameroun: An African Federation* (New York: Praeger Publishing, 1971) at 141.

[104] 3.3.1.(b) note 82.

[105] Quoted in P. Archer and L. Reay, *Freedom at Stake* (London: The bodley Head, 1966) at 22.

> the first act of legal repression may help to reconcile the public to the loss of freedom, and the first public acceptance of inhumanity will lead to legal provision for tyranny.

It should only be added further that a state must be committed to ensuring that its laws accord with its international commitments. Otherwise:[107]

> this procedural instrument[[108]] is of no practical value and it will only help to make "official" or "documented" list of the human rights violation of particular states more lengthy.

Judicial review will become an empty promise if one cannot vindicate one's constitutional rights.[109] This is the more so where there is a marked difference between "formal" and "material" conformity to the constitution. It is worth noting that the French *Conseil*, even before the 1974 reform, "had *seized* an occasion[[110]] offered it to present itself to the public as more than a mere weapon in the hands of the executive to control the legislature."[111]

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[106] *Ibid*. Compare 3.3.1.(b) notes 69 to 73.

[107] H.M. Kindred et al., *International Law Chiefly as Interpreted and Applied in Canada* (Emond Montgomery Publications Ltd., 1987) at 663.

[108] That is, the Universal Declaration of Human Rights, G.A. Res. 217 (III), 3 U.N. GAOR Res. at 71, U.N. Doc. A/810 (1948) (which Cameroon signed and ratified) or the Convention on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) adopted Dec. 16, 1966, entered into force March 23, 1976.

[109] See 1.1.1. and 2.2.1.

[110] That is, the declaration on the preamble already noted.

[111] Radamaker, *supra*, note 45 at 141. My emphasis.

We have so far put before Cameroon's "teleguided"[112] courts the position of "Mother" France with regard to the preamble, while rebuking them, as well, for not emulating Coke by arguing "quite daringly before the king himself [or President of the Republic] that while his majesty was by nature a very able man, he was not learned in the laws of England."[113] This exercise would be incomplete if we do not also lay before these Cameroonian judges the Anglo-American or Canadian position on the preamble. Cameroon, in view of its "legal dualism", may hold out to "Mother French" civil law that it is emulating *l'esprit Anglo-Saxon* in this "preamble affair". It is such a feigned possibility that we will proceed to dispel.

4.3.1.(b)(ii) In Common Law

As New Jersey's retired 10th Congressional District Congressman, Peter W. Rodino, tells us, the preamble is, first and foremost, an article of faith, where the Framers reveal and record their "vision" of the new Republic they form. Second, it is an unmistakable covenant of trust, so that any breach of it threatens the very foundation on which the society is based.[114]

In the American polity, balance was the hallmark of the Union as it was being formed. All other avowed purposes of forming the new Republic must necessarily dovetail with the preamble if the system is to work. There are diverse elements of the public good, and the achievement of any government is its success in mingling them in their due proportions.[115] If the Constitution is, indeed, a living document, then the promise of the preamble- "the unmistakable vows of a covenant between the government and citizens prefacing the body of the Constitution"[116]- must "be reaffirmed everyday, every year"[117] because "without a constant, real life affirmation of the social compact as envisioned in the preamble, even the most carefully constructed constitutional mechanism will be unable to renew the promise of a great and compassionate America as bequeathed to us by the Framers."[118]

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[112] This term is typically Cameroonian. It is the anglophonized version of the French "teleguidé", which signifies (as used here) a court which is somehow under remote control.

[113] Quoted in Gwyn, *supra*, note 11 at 6.

[114] Rodino, *supra*, note 18 at 686-87.

4.3.2. Recommendation

The need for a constant affirmation of the covenant in the preamble is important. This is because nothing undermines the rule of law more than the desire for some temporary government- even for purposes believed to be good- to set aside the law, distort it or ignore it.[119] The importance of the preamble of a constitution cannot then be overemphasized. This is seen in the preamble to the Canadian *Constitution Act, 1982,* which founds Canada "upon principles that recognize the supremacy of God and the rule of law."[120] The role and importance of judicial review of legislation in Canada has been significantly enlarged with the *Constitution Act, 1982*. The Courts must, therefore, not hesitate to strike down any law which is inconsistent with the *Charter*. The fulfilment of the grand objectives which inspired the *Charter*, "is dependent in large measure *on the strength and fortitude of the judiciary*."[121]

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[115] Per Madison, cited, *ibid.*

[116] *Ibid.* at 686.

[117] *Ibid.* at 694.

[118] *Ibid.* at 687.

[119] *Ibid.* at 695.

[120] Also see Justice Dickson, *supra*, note 22 at 2.

Upholding the Constitution requires day-to-day vigilance; a good heart and good intentions are not enough.[122] Legislators, judges, politicians, and the like should be constantly heard, concerning legislation that attempted violating the Constitution, to proudly say (as Rodino): "I fought that legislation; and, I am happy to say, it failed."[123] We can see that the 1954 U.S. Supreme Court decision in *Brown* v. *Board of Education of Topeka*[124] "gave the needed signal that the *promise of the preamble's pledge* would not continue to go unheeded."[125] This decision, while carrying the fledging civil rights movements into the 1960s, also became the polestar for action by the legislative branch. Legislation that followed the decision sent this message to all Americans:[126]

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[121] *Ibid.* at 10-11. My emphasis. See also 3.2.0. note 23; and, in anticipation, 5.1.0. notes 2 to 7.

[122] Such constant vigilance "...is a defence against tyranny or, leaving aside the harsher aspects of tyranny, against selfish or myopic rule. It is a device for securing justice as well as order....A benevolent ruler, whether an enlightened despot of the eighteenth century or a Nyerere or Kaunda of the twentieth, will try to preserve justice in other ways; but these are intrinsically frailer." Per P. Calvocoressi *Independent Africa and the World* (New York: Longman, 1985) at 23.

[123] Rodino, *supra*, note 18 at 690.

[124] [1954] 347 U.S. 483 (invalidating segregation in public schools).

[125] Rodino, *supra*, note 18 at 690. My emphasis.

> [Y]es, there was a problem of inequality in our midst and...*we the people had to remedy it if the nation was to live up to the preamble's promise* of equal justice for all....If the preamble's compact with the people was to be honoured, *that practice had to end*.

Cameroon may want to say that conditions in the early years of independence[127] warranted its adopting laws that violated its constitution's preamble in particular and the entire document in general. It would, however, be pointed out that those laws (including the unconstitutional constitution itself) ought to have been rendered "of no force or effect" by now. Yet, as recently as 1989, Cameroonians (now known as a peace-loving people[128]) are still being laden with retrospective legislation.[129]

It is simply indefensible, in the light of the foregoing, for the Cameroonian Courts (and all those who are supposed to aid them[130]) to continue (1) to regard the preamble as an unenforceable part of the constitution, and (2) to wait to be told by the president of the republic how and when to decide or not to decide cases coming before them. We have seen how, like the U.S. courts, the Indian judiciary took upon themselves to rewrite and rework the provisions of the Constitution when circumstances called for that. This writer thinks that the portion of the constitutional document which merits the greatest attention is the preamble.

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[126] *Ibid.* at 690-91. My emphasis.

[127] See 3.2.2. note 26. See also V.T. Le Vine, *The Cameroons- From Mandate to Independence* (Berkeley: University of California Press, 1964) at 176-180.

[128] See 3.3.2. note 45.

[129] See *supra*, note 83.

[130] See, e.g., 5.5.2. note 91.

The people have a right to expect complete integrity from their leaders and adherence to the vision of the preamble. They, however, also have an obligation to demand it through the participatory process, as indicated in Chapter Three. Responsible citizenship is, quite simply, the price for our freedom and that part of the social compact that is ours alone to uphold.[131] The Constitution's promises must, therefore, be scrupulously respected, and ensuring that it is respected:[132]

> *is a primary function of the judiciary in any country which has a proper constitution*. By a proper constitution I mean *one in which no one organ has unlimited power and in which there is legal machinery to prevent violation*.

May one not be tempted, at this juncture, to think that this thesis is advocating *un gouvernement des juges*?

4.3.3. Government by Judiciary?

Although the thesis advocates a strengthened role for the judiciary as a third and powerful branch of government (in Cameroon especially), it is also sensitive to the complexities and constraints to such role. One thing which is pellucid, however, is that there "is no reason to suppose that this means government by judges. It means *government by governments, but within a*

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[131] See Rodino, *supra*, note 18 at 700. See also 3.2.2.; 3.3.2.; and 3.5.0.

[132] Wade, *supra*, note 49 at 77. My emphasis.

framework of rules, the judges being umpires."[133] One is not unaware of the controversy the power of law making by unelected justices in constitutional cases creates.[134] To most judicial pundits and politicians, this is inconsistent with the basic tenets of majority rule in a democracy. What is to be done then?

4.3.3.(a) The Available Theories

Such an objection would not present a problem if Court rulings are regarded as merely positing a point of view that the people are free to reject, modify, or to codify by enacting legislation through their elected representatives in the legislatures.[135] The Court's ruling must be "subject to revision over time, or the Constitution falls captive...to the anachronistic views of...[long-past] generations."[136]

Constitutional theories of judicial review fall into two main camps: interpretivism and noninterpretivism. *Interpretivism* claims that judges should decide constitutional issues solely by discovering norms found in the Constitution. But, as Dimond argues, the Constitution has not, does not, and cannot provide a single answer to every issue that is brought before the Court.[137] Judicial choices in interpreting the Constitution must not, therefore, be understood as final judgments binding on the people forever but as provisional rulings that initiate an ongoing dialogue with the people.[138]

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[133] *Ibid.* at 73. My emphasis.

[134] See A.C. Hutchinson, "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) *U. of Miami L.Rev.* 541 at 543 declaring that in a "political and legal system that claims to be democratic...impersonal constraint on the important activities of unelected officials is vital to that system's continued legitimacy and appeal. This need is particularly acute in the area of constitutional adjudication."

[135] Dimond, *supra*, note 59 at 1. "The central difficulty with most anti-review arguments is that they try to prove too much with too little. Obviously, the people can vote legislators out of office whereas judges remain comparatively immune. If that claim is decisive, it argues not against judicial review, but against an independent judiciary." Per L. Green, "Book Review of *The Rule of Law: Ideal or Ideology* by A.C. Hutchinson and P. Monahan" (1986) 24 Osgoode Hall L.J. 1023 at 1040.

[136] Dimond, *ibid.* at 2, quoting Justice Brennan's speech, reprinted in *Federalist Society, The Great Debate: Interpreting Our Written Constitution* (1986) at 24. See also L.B. Boudin, *Government by Judiciary* Vol.I (New York: Russell & Russell, 1932) at viii.

On the other hand, the theory of *noninterpretivism* argues that the judges must often look beyond the Constitution for principles to decide constitutional cases that come before the Court.[139] The doctrine of judicial review has become somewhat confusing simply because constitutional scholars often support their normative claims of how the Court should act with their description of how the Court does act.[140]

4.3.3.(b) A Suggested Solution

As an answer to the apparent contradiction between judicial review and representative democracy, Paul Dimond offers what he calls provisional review, which, according to him, is a more workable understanding of the dynamics of judicial review. This requires the viewing of the Supreme Court's decisions not as final and binding in all circumstances, but rather as provisional in some cases.[141] It "provides a different lens through which to see how the Court may interact with the people over time in interpreting the Constitution."[142] This means that, by initiating action, the legislature or the executive (but especially the first) might still override the court's decision. Viewed from this perspective, judicial choice in constitutional cases may then be seen more clearly as an integral part of the lawmaking process through which the people govern themselves by engaging in a national dialogue over the meaning of the Constitution. The Court's ruling is understood as beginning rather than ending this process of interpretation.[143] With this vision of the Court as the initiator of a dialogue with the people over the meaning of the Constitution, and not as the final arbiter, judicial review becomes more consistent with the principle of majority rule in a representative democracy.[144]

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[137] This is what Hutchinson calls "indeterminacy". See *supra*, note 134 at 554-557.

[138] Dimond, *supra*, note 59 at 3 & 4.

[139] *Ibid.* at 5.

[140] *Ibid.*

[141] *Ibid.* at 11. See also to same effect, H. Wellington, "Judicial protection of Minority" (1977) 75 *Mich. L. Rev.* 1162 at 1187-90; H. Wellington, "The Nature of Judicial Review" (1982) 91 Yale L.J. 486 at 504-520.

Though the suggested solution is not without its own defects,[145] it will serve a useful purpose:[146]

> if it convinces the Justices, pundits on all sides of the political spectrum, and the people to be *skeptical* of claims that the Constitution provides a single, simple answer for every question and that the Supreme Court rulings should be final because the Justices can divine how the framers specifically intended to resolve all the constitutional cases that come before the Court.

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[142] Dimond, *ibid.* at 5; & 155.

[143] *Ibid.* at 5.

[144] *Ibid.* at 12. See to same effect, J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 1-2.

[145] For example, explicitly embracing it may result in Parliament feeling "free to run roughshod over the Court's point of view; and the people might then lose respect for the Court altogether." Per Dimond, *ibid.* at 19.

[146] *Ibid.* at 20.

Moreover, the Court's power of review can never truly amount to *un gouvernement des juges* as the French are wont to suppose[147] because, although theoretically the:[148]

> power of the judge of constitutionality is awesome...in the end he has "neither sword nor purse" and must depend on others to give his decision meaning.

Even when there is no judicial review, as in Cameroon, courts are often structurally linked with the bureaucracy, providing a channel for communication and numerous occasions for co-operation and conflict.[149] Karpen, talking about the German court, states:[150]

> The Court at its best provides a symbol of reconciliation, open interpretation and an active fusion of idealism (as a continental heritage)[151] and pragmatism (as a gift of the Anglo-Saxon world).[152] The Court keeps in mind that it is called upon "to make the constitution," but it lacks arms and appropriations to enforce its decisions. It is dependent upon the general acceptance of its moral legitimacy.

And even without formal links, courts often hear cases involving government officials[153] and, of course, interpret statutes, and everywhere judicial decisions require implementation by other officials. Judges have neither the sword nor the purse because their appointment, remuneration, training, promotion, and the like are generally determined and effected by persons belonging to the other branches. These we will examine in the next Chapter.

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[147] See, for example, Radamaker, *supra*, note 45 at 129. Were we to choice this or that, it would be better to have *un gouvernement des juges* than the "government by decree" which is typical of Cameroon.

[148] Cappelletti, *supra*, note 38 at 98. See also Wambali and Peter, *supra*, note 30 at 138 ; Justice Dickson, *supra*, note 22 at 19-20; Anyangwe, *supra*, note 10 at 26, 35-36; and Madison, *Federalist* No.78,(ed. H. Dawson 1863) at 542.

[149] Waltman, *supra*, note 38 at 5.

[150] U. Karpen, "Rule of Law" in U.Karpen, ed. *The Constitution of the Federal Republic of Germany* (1988) at 181, quoted in Ackermann, *supra*, note 45 at 71.

[151] A heritage which Cameroon does not lack either.

[152] Cameroon has this as well.

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[153] Though, again, as we saw in Chapter Two, the Cameroonian judge *cannot* issue any order or whatever to a member of the executive. He or she does so at the risk of a term of imprisonment or fine.

CHAPTER FIVE

JUDGES' APPOINTMENT, PROMOTION, AND TENURE OF OFFICE.

"*The quality of our judges is the quality of our justice...*"- Professor R.A. Leflar.

"*A judge has no constituency except the unenfranchised lady with the blindfold and scales, no platform except equal and impartial justice under law. Yet he needs to be aware of the political dynamics of...society.*"- Maurice Rosenburg.

5.1.0. Introduction

The personnel of judicial institutions are almost always composed of people who are formally selected by other state actors. This dependency, inevitable as it is, is further conditioned, positively or negatively, by the mode of selection employed. What are these different recruitment methods for the different levels and types of courts? What kinds of career patterns are observable? Is a judgeship a capstone for a successful legal career or is it a lifetime occupation entered soon after completing one's legal education? Is the judiciary attractive to the best of the legal profession, or is it a burial ground? What is the standing of judges compared to other political elites?[1] What about retirement and removal? From what socio-economic backgrounds do judges come? They would, quite naturally, be overwhelmingly from elite backgrounds by virtue of their educational attainments, if nothing else. But how much of an elite are judges? And are there differences according to the level of court? In attempting answers to these questions and many others in this Chapter, the divergence and similarities between Cameroon and Canada will be further exposed.

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[1] See J.L. Waltman, "Introduction" in J.L. Waltman and K.M. Holland, eds. *The Political Role of Law Courts in Modern Democracies* (New York: St. Martin's Press, 1988),1 at 4.

In the first section we will examine the dependency of judicial officials begun in the last Chapter. The second section will treat the various methods of judicial recruitment, while in the third we will examine the situation in Canada and Cameroon. The necessary qualifications for recruitment will be the topic of the fourth section. The fifth section will look at the career pattern that may be discernible in the two countries, while section six will be devoted to judicial remuneration. The final section will deal with judicial tenure and the methods of terminating judicial office. Those were the various sections and their subject-matter.

We will cursorily look at the nature of the judicial office and its holders before embarking on the matters just enumerated. To begin with:[2]

> [t]here are jobs which can be done by [u]ndisciplined people and people whose personal integrity can be called into question; being a Judge or Magistrate is not among them.

This is because:[3]

> [j]ustice is an alloy of men and mechanisms in which men count more than machinery. Assume the clearest rules, the most enlightened procedures, the most sophisticated court techniques;

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[2] President Julius Nyerere of Tanzania's Speech to the meeting of Judges and Resident Magistrates at Arusha on March 15, 1984 (see *Daily News* (Tanzania) March 16, 1984), quoted by M.K.B. Wambali and C.M. Peter, "The Judiciary in Context: The Case of Tanzania" in N. Tiruchelvam and R. Coomaraswamy, eds., *The Judiciary in Plural Societies* (New York: St. Martin's Press, 1987), 131. Compare Denning and Maduna in 4.2.2 at notes 67 and 68 respectively.

[3] M. Rosenburg, "The Qualities of Judges- Are They Strainable?" in G.R. Winters, ed., *Judicial Selection and Tenure* (Chicago: The American Judicature Society, 1973), 1.

the key factor is still the judge.

This may be true as, in the long run, "[t]here is no guarantee of justice except the personality of the judge."[4]

The qualities of judges,[5] their political[6] and social orientation, the method of appointing, removing, disciplining, and educating them, have a crucial bearing on the role of the judiciary in any state.[7] Two basic features can be singled out in the case of Canada. First, Canadian judges are *appointed* by those heading the executive branch.[8] Second, they are selected from the bar of each province.[9] This requirement of selection from the bar of each province is needed so that the judges should be conversant with the local law.[10] Though there are variations within Canada, its system has been compared to two other variants used internationally.[11] These variants are the elective judiciary, as exists in Poland and some states in the United States; and the career judiciary as obtains in France and Cameroon. In addition, there is what is termed selection by the judiciary itself, otherwise known as co-option. This is employed in Belgium and Italy.[12] Professor Blythe Stason has described these various methods of judicial selection. In doing so, the Professor takes us "on a trip around the world...to see how other peoples solve the problem of selection of their judges", starting:[13]

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[4] Elhrich, "Freedom of Decision" (1917) *Modern Legal Philosophy Series* at 65, cited in Rosenburg, *ibid*. Chief Justice Coke in Chapter Three (note 65) provides enough corroboration to this. Chief Justice Marshall of the U.S. is also instructive, as to which, see K.M. Holland, "The Courts in the United States" in Waltman and Holland, *supra*, note 1, 6.

[5] See A.T. Denning, *The Road to Justice* (London: Stevens and Sons, 1955) for an elaborate discussion of the qualities of a good judge. Rosenburg finds the composition of a list of these qualities "notoriously elusive" and "particularly obscure when the qualities sought are personal, subjective, and human"; this makes the problem "a vexing one": *supra*, note 3 at 2 & 6 respectively.

[6] In Cameroon, as already indicated in Chapter Two, they are supposed to live a cloistered life, uninterested in the world outside their court. See 2.2.3. (at note 96). It is submitted that this manner of looking at the issue fails to take into account the fact that these judges must conform to the political thought of their time in laying down rules of conduct. See A.T. Denning, *Freedom Under Law* (London: Stevens & Sons, 1949) [hereinafter *Freedom*] at 67. Certainly, Cameroonian judges, as noted in Chapters Two and Four, are not entitled to lay down any of such rules; the laying down of which is, supposedly, the sole preserve of the politicians. But this writer does not see why this should be so because if "this is a world in which political scientists and economists have to live in...why should it not be habitable by lawyers" and judges who, "like every one else,... live in a world in which brickbats of all kind are flying in all directions"?: H.W.R. Wade, *Constitutional Fundamentals* (London: Stevens & Sons, 1980) at 2 & 76 respectively.

[7] See P.H. Russell, *The Judiciary in Canada: Third Branch of Government* (Toronto: McGraw-Hill, 1987) at 107.

[8] This is the same in Cameroon. See M.W. Delancey, *Cameroon: Dependence and Independence* (Boulder: Westview Press, 1989) at 57.

[9] Sections 98 and 99 B.N.A. Act, 1867. It is different in Cameroon. See recruitment qualification below (5.4.0.). Compare 2.1.3. note 16.

> with the assumption based on historical facts that all countries in the civilized world are interested in obtaining the benefit of service on the bench of men of independence and judicial ability.

Even though the country is considered to be both a *law* and *language* laboratory, "[t]here is little published material either on Cameroonian *law* generally or on its *judicial* system in particular."[14] Professor Stason will, therefore, only be justified in his assumption to the extent that he admits, as his survey portrays, that he never had any "historical facts" on Cameroon (about whose judicial system very little is known) or, if he had, that he does not (after a perusal of those facts), rightly, include Cameroon in his "all countries in the civilized world" for reasons which are obvious from the portion of his writing just quoted. Before we jump into Professor Stason's round-the-world vessel of discovery, however, we must first canvass this question of the dependency of judicial recruitment begun in Chapter Four.

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[10] P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 137. As we will see later (*infra*, note 78), this rationale has no place in Cameroon.

[11] See Russell, *supra*, note 7 at 108-111 where the comparison is made.

[12] See C. Anyangwe, *The Magistracy and Bar in Cameroon* (Yaoundé: PANAG-CEPER, 1989) at 8-9. This cooption has been suggested in Canada by Justice Deschênes in regard to the selection of the chief justices; but it "is likely to be a long time before any Canadian government is likely to agree to this much judicial autonomy": Russell, *ibid*. at 141.

[13] E.B. Stason, "Judicial Selection Around the World" in Winters, *supra*, note 3, 45 at 46.

[14] C. Anyangwe, *The Cameroonian Judicial System* (Yaoundé: CEPER, 1987) [hereinafter *Judicial*] at xv. My emphasis.

5.1.1. The Dependency of Judicial Recruitment

The dependency of judges on the other actors in the state apparatus is most manifest in their selection (particularly through appointment),[15] promotion, removal, education, training, and so forth. This dependency is as inevitable as it is necessary. The necessity is justified on the basis of "inter-organ controls" or checks and balances, the hallmark of separation of powers. The ineluctability can be deduced from the fact that the American Founding Fathers, so jealous of the principle of the separation of the three branches of state power as they were, still provided for the appointment of federal judges by the chief executive: with the advice and consent of the Senate.[16]

These other state actors on whom judges depend are not a random selection of individuals but part of the system of political and social power in the country. This dependency would, normally, be at odds with the traditional ideology of the liberal state which insists upon and emphasizes the neutrality of the judiciary under the rule of law. But:[17]

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[15] It is generally thought that, by the elective process, they are not dependent on the other state actors or branches. But, as will be shown below (5.2.1.), this is a fallacy or one of those familiar ideological myths.

[16] See A.T. Klots, "The Selection of Judges and the Short Ballot" in Winters, *supra*, note 3, 78 at 84.

> ideological myth must confront the reality of an elite recruitment process. For that is what is involved in selecting judges: appointing judges is part of the process of recruiting a society's governing elite. The process may or may not select the best people for the job- that is another very important question- but we can be sure about one point: the process in social and political terms is never neutral.

In view of this fact, one would certainly agree with Lord Hailsham of St. Marylebone that an insistence on separation of powers in the American sense "is simply to indulge in self-delusion."[18] It is, consequently, asking too much to expect that political affiliations will play no part in a judge's selection, whatever method is adopted. Most of us would truly desire that a judge should have:[19]

> no constituency except the unenfranchised lady with the blindfold and scales, no platform except equal and impartial justice under law. *Yet he needs to be aware of the political dynamics of...society.*

Therefore, the best we can hope for is that political considerations do not become the only criteria and that some system can be found whereby qualifications for the job also play a significant part. This is even more pressing in a society that claims to be open, because "an honest and competent judiciary is vital to any truly free society and successful democracy."[20]

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[17] Russell, *supra*, note 7 at 107. Carl Baar demonstrates how, despite the efforts to eliminate them, "partisan considerations in judicial appointments" remain a "fact of Canadian political life" and "have rarely led to the appointment of a Conservative by a Liberal government, a liberal by a Conservative government, a New Democratic Party member by either one."- "The Courts in Canada" in Waltman and Holland, *supra*, note 1, 53 at 61.

[18] The Right Honourable Lord Hailsham of St. Marylebone, "The Office of the Lord Chancellor and the Separation of Powers" (1989) 8 *Civil Justice Quarterly* 308 at 317.

[19] Rosenburg, *supra*, note 3 at 7. My emphasis. Compare text in note 6 above (Denning & Wade).

As already noted, most people would look to the elective process as an answer to judicial dependency. But, as we will see later in the Chapter, pains have been taken "to emphasize the *fallacy* of the assumption underlying the present practice [of electing judges] that our judges are really being chosen by the people."[21] Just as Professor Russell has predicted, a strong desire to curb political interference in the selection of judges in Canada might encourage a movement towards the postwar Italian system, where concern for judicial independence in the appointing process inspired constitutional provisions vesting responsibility for the appointment of judges in a Higher Judicial Council, a majority of whose members are elected by career judges. Russell diligently warns Canadians not to rush to the conclusion that this is the surest way of eliminating politics from the appointment system, because "it has promoted an intense political struggle between younger and older judges to control the judicial hierarchy."[22] This warning is very timely.

Cameroon, it should be noted, also has this Higher Judicial Council

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[20] Klots, *supra*, note 16 at 83.

[21] *Ibid*. at 84. My emphasis. See *supra*, note 15

[22] *Supra*, note 7 at 111. In addition, Baar thinks (like Russell, see note 12 above) that "the federal government is likely to greet any such recommendation with scepticism and reticence.": *supra*, note 17.

(hereafter HJC) by virtue of article 31 of its Constitution. But the judges, who form an insignificant minority in it, in addition , do not have any influence on the decision as to who their "representatives" should be.[23] Moreover, the bar associations, in the case of Canada and the United States, from which these judges (for such a Council) would be elected or appointed:[24]

> are not immune from political infection...as virtually every member knows. Indeed, bar associations necessarily involve "politics" upon two separate and distinct levels: A high percentage of the active members who become officers and committee chairmen are also active in national political parties, and do not entirely leave their partisan predilections at the door when they engage in bar association activities....

We may now board Professor Stason's ship to survey the recruitment methods.

5.2.0. The Methods of Judicial Recruitment

There are many variants[25] as noted earlier; but we will look at the two most widely used, namely, the elective and appointive systems. The fact that both have their advantages as well as seemingly insurmountable disadvantages, goes to illustrate the dilemmas inherent in the selection and retention of judges. These have been enough cause for concern to the bench, the bar, and the public in democratic societies. For, as it has been graphically stated, the Koranic verse that "A ruler who appoints a man to office when there is in the kingdom another man better qualified for it sins against God and against the State", should have great meaning:[26]

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[23] See **3.4.2.** (between notes 141 and 143); and Anyangwe, *supra*, note 12 at 9. It is, thus, more of a formality than a device for obviating what the Italians feared. See **2.3.1.** and **3.3.0.**

[24] B. Golomb, "Selection of the Judiciary: For Election" in Winters, *supra*, note 3, 74 at 76.

[25] For a general and extensive critique of the various selection methods, see C.H. Sheldon, "Judicial Recruitment: What Ought to Be and What Is" in Winters, *ibid.*, 53.

> [t]o lawyers who take seriously their professional obligation to work for improvement of the administration of justice, and to citizens who want their courts to come as close as humanly possible to the ideal of equal and exact justice to all.

Which of these two widely used methods, then, would better attain the ideal state?

5.2.1. The Elected Judiciary

Popular election for a short term was idealized as the solution to all governmental problems during the era of Jacksonian democracy in the United States. The process is still tenaciously clung to by many people today; representing, as it were:[27]

> a manifestation of a deep-rooted determination among free people to keep in their own hands control over the process whereby their lives, liberties, and properties are disposed.

This selection process would be quite attractive, especially to those who have experienced the gross abuses of the unfettered appointive system present in Cameroon.

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[26] G.R. Winters, "One-Man Judicial Selection" in Winters, *supra*, note 3 [hereinafter One-Man] at 90. The title to this essay, as must already have been noted from previous Chapters, very aptly describes the situation in Cameroon. Contrast this quotation with 3.3.1. and 3.3.2. Both groups indicated in the quotation obtain a positive note in Canada as indicated in Chapter Three.

[27] G.R. Winters, "Judicial Selection and Tenure" in Winters, *ibid.*, 19 [hereinafter Tenure] at 24. For a detailed analysis of the courts and Jacksonian Democracy, see L.B. Boudin, *Government by Judiciary* Vol.I (New York: Russell & Russell, 1932), chapter 8. Compare 4.2.2. note 60.

But there are practical as well as theoretical objections to the election of judges- those "persons who are charged with the intricate and delicate task of applying the law in cases involving our rights, duties, and privileges."[28] First and foremost, the vote cannot be used to select all or most of the public officials because voters, even in the smallest communities, are not acquainted with the people named on the ballot and, consequently, have no means of knowing which ones should receive their votes. Any choice they may make, therefore, is a blind one, and any opinion only a guess.[29] Again, these voters lack interest in the judiciary; they "are least interested in the judicial candidates. The average voter does not realize that he has anything but a very remote interest in the election of a good judge."[30] Furthermore, the top persons of the bar of states that rely on this method of selection are seldom to be found on the bench. Surveys have shown dissatisfaction in all but very few of the states operating principally with the elective judiciary. No less important a defect is the system's "admirable facilities for the corruption of the judiciary."[31] The thought of an approaching election, too, would certainly affect the manner in which justice is dispensed just as much as that of dismissal would do to a judge that depends- as in Cameroon- on the whims and caprices of the executive for his or her tenure.

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[28] Stason, *supra*, note 13 at 46. See also 2.2.0.

[29] Tenure, *supra*, note 27 at 22-23.

[30] Klots, *supra*, note 16 at 83. Compare 1.1.1. note 16.

[31] Tenure, *supra*, note 27.

It is undemocratic to impose on the democratic process burdens which the process is not equipped to bear. This is exactly what the elective method does, because voters normally have no free choice, but must vote for the persons nominated and whose names are on the ballot. Thus, the person actually exercising a *de facto* power of appointment is the one who makes the nominations. The controlling considerations for such nominations "in ninety-nine out of a hundred," are "purely political ones."[32] In the final analysis, therefore, we find all judges, "even under an elective system" being "actually appointed."[33] This happens because judges, normally appointed "to fill vacancies", are almost invariably retained in office at the next election. This invariable retention is due to their "heavy advantage", especially, from having "recently had the specific endorsement of the state's highest-ranking government official."[34]

We have just seen how the elective process invariably ends up being appointive. It is time we examine this other alternative, which both Canada and Cameroon employ.

5.2.2. The Appointed Judiciary

The appointive system, though not without its own shortcomings, may be preferred. It makes it possible for the professional examination of candidates' qualification.[35] By this process:[36]

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[32] *Ibid.* at 23, 22.

[33] G.R. Winters, "Preface" in Winters, *supra*, note 3. [Hereinafter "Preface"]

[34] One-Man, *supra*, note 26 at 85.

> the selection of judges... is...put upon some officer elected by the people, whose office is sufficiently conspicuous to have enlisted the people's interest in his candidacy and whose qualities the people have taken the trouble to appraise.

Thus, we find that in the United States, the President's principal source of influence over the nation's Supreme Court is the power of appointment.[37] There are safeguards to prevent personal oppressive power of appointment in the country. The most pronounced of such mechanisms is that such appointments are "by and with the advice of the Senate."[38] The confirmation device is helpful in deterring a less sincere executive from making unworthy and arbitrary appointments that may not be approved by the confirming body.[39] President Franklin Roosevelt attempted to pack the Supreme Court when he was frustrated by judicial opposition to his New Deal economic recovery programme.[40] He attempted to persuade Congress to increase the size of the

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[35] Tenure, *supra*, note 27 at 24.

[36] One-Man, *supra*, note 26 at 84.

[37] See Holland, *supra*, note 4 at 27. In Canada appointment at this level as well as at the higher provincial level "is of particular concern to the prime minister": Russell, *supra*, note 7 at 113.

[38] See P.R. Dimond, *The Supreme Court and Judicial Choice: The Role of Provisional Review in a Democracy* (Ann Arbor: The University of Michigan Press, 1989) at 3-4. Allan C. Hutchison would, then, be right in thinking that the U.S. method is better than Canada's method of appointing Supreme Court judges by executive decrees: "A Way to Judge the Judges" *The Globe and Mail* (Toronto) (October 17, 1991), A23.

[39] Tenure, *supra* note 27 at 21. The U.S. presidents do not seem to be content with this checking device however. See "Bush to Propose Changes in Senate Approval Process" *Globe and Mail*, *ibid*. at A19.

[40] See 4.2.2. note 67.

Court from nine to fifteen.[41] Congress declined. Due to deaths and retirements, however, Roosevelt was able to appoint nine justices to the Supreme Court during his exceptional four terms in office. It was only through this means that the New Deal was saved.

The United States federal appointing process, with its checks and balances, is, however, not ideal and beyond criticism:[42]

> because selection of judges under that plan is not sufficiently insulated from the pressure of political forces. A president or governor is a political officer who reached that position by winning in the game of politics. The same is true of members of the Senate. Under our bipartisan political system, with rare exceptions, all are active members of one of the other two leading political parties. Appointments to any kind of public office are always important political prizes.

Whatever the case, it is necessary that judges be appointed in such a way as to ensure the greatest individual independence possible. The judiciary, as Chief Justice Dickson has indicated, is as good as the people who compose it.[43] It is, therefore, essential, the Chief Justice insists, that judicial appointments be made on the basis of merit alone because judicial independence necessarily requires that a judge engage in his or her task in as apolitical and impartial a manner as is humanly possible.[44] Judges, Chief Justice Dickson concludes, must be appointed on the basis of their ability to dispense justice in an intelligent and impartial manner, and not out of political and partisan motivation.[45]

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[41] The size of the Cameroonian Supreme Court, as indicated in Chapter Two, will forever remain the President's secret. See 2.2.3. (up to note 72), 4.2.2. note 60, and 5.3.3. below, for the unbridled and unreviewable power of appointment of the President of Cameroon.

[42] Tenure, *supra*, note 27 at 21-22. Compare *supra*, note 24. It is thought that appointments to the English House of Lords, "the best club in the world" provides the Prime Minister with "a useful device for retiring ageing or incompetent Ministers without disgrace- purging his Government by promotion." Per R.H.S. Crossman, *The Myth of Cabinet Government* (Cambridge, Mass.: Harvard University Press, 1972) at 54. The Canadian equivalent, the Senate, is also regarded as "an invaluable means of pensioning off ministers, M.P.s and others whose health and fortune have been ruined by long service in the political wars." Per J.R. Mallory, *The Structure of Canadian Government* (Toronto: Gage Publishing Company, 1984) at 256.

[43] Compare, *supra*, note 2 and the references therein.

On taking Jethro's timely advice on the need to create a judicial body, Moses faced the difficulty of finding and appointing the right people (i.e., with the necessary qualities).[46] The same problem confronted King Harmhab of Egypt, who travelled the whole country and could get only two candidates who met the standard set![47] Here we can see these two rulers doing everything possible to have the best candidates, just as the above-cited verse from the Koran demands. These two selectors, however, vividly contrast with the king's court in:[48]

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[44] Winters also suggests non-partisan merit selection as "the most rational way to get well-qualified judges who will be free of undue political influence and will be sufficiently independent to do a good job.": "Preface" *supra*, note 33.

[45] Chief Justice B. Dickson, "The Rule of Law: Judicial Independence and the Separation of Powers" (Address to the Canadian Bar Association, August 21, 1985) [Unpublished] at 13. Baar furnishes a variety of attempts that have been made since the late 1950s in Canada to constrain the discretion of cabinet over judicial appointments; this, because of the realization that "partisan political considerations have reduced overall quality of persons appointed to the bench.": *supra*, note 17. These attempts conspicuously contrast with the position in Cameroon as shown in note 41 above.

[46] See Tenure, *supra*, note 27 at 20.

[47] *Ibid.*

[48] *Ibid.* at 21. The heroic fight of the English to remedy this adverse situation led to the *Act of Settlement, 1701*. But this has always been, and still is, the guiding philosophy of appointments in Cameroon in general; but as to the judicial specifically, see, e.g., 2.2.3. (between notes 81 & 92); **3.3.1.(a)** notes 58 and 62; **3.4.2.** generally; and, later (**5.3.3.**).

> some of the less glorious chapters of English history [when judges] were...chosen not for their integrity and judicial ability but for their willingness to co-operate with the sovereign in oppressing the people.

Judges should be chosen only for their faithful and impartial administration of justice, for:[49]

> [t]here is nothing like them at all in our Island. They are appointed for life. They cannot be dismissed by the executive Government. They cannot be dismissed by the Crown either by the prerogative or on the advice of Ministers. They have to interpret the law according to their learning and conscience. They are distinguishable from the great officers of the State and other servants of the Executive, high or low, and from the leaders of commence and industry. They are also clearly distinguishable from the holders of less exalted judicial office. Nothing but an Address from both Houses of Parliament, assented to by the Crown, can remove them.

We will now examine, in the sections that follow, the responses of both Canada and Cameroon to Sir Winston Churchill's propositions, beginning with judicial appointment and walking right through to termination of that office.

5.3.0. Judicial Appointment in Canada

In Canada, judicial appointments occur at two levels, reflecting the country's federal structure. Though we are more concerned with the country as a whole in this thesis, we are interested, as well, in the judges of the provinces. The explanation is as simple as we saw in Chapter Two, namely, the unified or pyramidal judicial system, which gives the country its unique form of co-operative federalism. We will begin with the federal to be followed by the provincial appointments.

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[49] Sir Winston Churchill, H.C. Deb., March 23, 1954, col. 1061, quoted in Denning, *supra*, note 5 at 14. See also Hogg, *supra*, note 10 at 139; and Russell, *supra*, note 7 at 75. Cameroon, as can already be noted, flatly disagrees with most of these. There is now a mandatory retirement age in Canada. There has always been a "statutory" one in Cameroon. See retirement below (5.7.5.).

5.3.1. Federal Appointments

The appointment process in Canada brings democracy and professionalism into conflict. The process is in three stages, namely, selection, screening, and appointment.[50] Judges of the highest provincial courts as well as the judges of the federal and Supreme Court of Canada are all appointed by the central government.[51] In no other federal state, Russell declares, is there such a centralization of control over judicial appointments.[52] Hogg notes that on the face of it, this provision (section 96) is an anomaly in a federal constitution, having no counterpart in the constitutions of the United States and Australia, where the federal government plays no role in the selection of (state) judges. Hogg questions the rationale for the federal government appointing judges to the provinces' highest courts, dismissing, as not particularly convincing, the conventional answer that section 96 reinforces judicial independence by insulating the judges from local pressures. This is because there is no reason to suppose that judges appointed by the provinces would be less competent[53] or less independent[54] than judges appointed by the federal government. To Hogg, the result of the judicature sections of the 1867 Act is co-operative federalism.[55]

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[50] It is only necessary repetition to stress that there is nothing of the sort in Cameroon. There, as the references in note 41 above show, the president appoints whoever, whenever, any number and in any manner and to whatever post: without any legislative or judicial control (or ratification) whatever. Thus, controversies over judicial (and other) appointments such as the *Bork* confirmation hearings in the United States or talk of federal government patronage in appointing judges in Canada (see *Report of the Canadian Bar Association Committee on the Appointment of Judges in Canada*, Ottawa: The Canadian Bar Foundation, 1985) chapter 6) are all things unheard of in Cameroon.

[51] Section 96 B.N.A. Act says Governor General (i.e., federal government) "shall appoint the judges of the superior, district and county courts in each province."

[52] *Supra*, note 7 at 114, 111-112.

Having compared the Canadian with the U.S. and U.K. appointing processes, Russell makes the following observation:[56]

> Aside from its impact on the quality of the judiciary, the political nature of judicial appointments at the federal level is also of interest to political scientists because of the power it enables the federal political elite to exercise. There are two principal dimensions to this power. First, there is the pure patronage element: the availability of a very large number of judicial vacancies for purposes of party management....The second dimension of political power in the political control of judicial appointments is the opportunity it gives the governing party in Ottawa to influence the political orientation of judicial power in Canada.

The federal appointing authorities have not perceived the judiciary as a threat to their policy or ideological interests on issues other than federalism. But this attitude has changed with the advent of the *Charter of Rights and*

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[53] Since they would, undoubtedly, be from the same group of senior lawyers from which the federal government also appoints.

[54] Their independence being specifically guaranteed by section 99. But see Chapter Three generally for other guarantees. For an elaborate discussion of the section, see Hogg, *supra*, note 10 at 138-141.

[55] *Ibid.* at 136-137. Hogg defines the essence of this kind of federalism (at 107) as "a network of relationships between the executives of the central and regional governments" through which "mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources *without recourse to the courts* or the amending process." My emphasis.

[56] *Supra*, note 7 at 116.

Freedoms.[57] Let us also look at the provincial situation.

5.3.2. Provincial Appointments

The *Constitution Act, 1867* gives each province power to make laws in relation to "the establishment and tenure of provincial offices and the appointment and payment of provincial officers."[58] Hogg indicates, however, that this includes only judges of "inferior" courts; and not of superior, county or district courts, where they exist. This is because sections 96 to 101 give such powers, *inter alia*, to the federal government. Hogg's view is that, because provincial courts are courts of general jurisdiction, the rationale for section 92(4) is very powerful where there are no federal courts (as at federation). It is the same where existing federal courts have very limited jurisdiction such as the Exchequer Court in 1875. But the justification becomes very much attenuated now that more and more federal questions are removed from the jurisdiction of provincial courts and vested in such federal courts as the Federal Court of Canada created in 1971.[59] More on this issue of provincial appointments will also surface when we discuss remuneration as well as in *Valente's* case where tenure of provincial judges is examined.[60] We will now examine the situation in Cameroon on this issue.

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[57] *Ibid*. See also 2.1.2. and 2.2.2. More on appointment in Canada at this level will surface as we discuss the other aspects such as remuneration and tenure below (respectively 5.6.0. and 5.7.0.).

[58] Section 92(4).

[59] Hogg, *supra*, note 10 at 136 n.19.

[60] See *supra*, note 57.

5.3.3. Judicial Appointment in Cameroon

There is really no need to spend much time on this issue. In addition to what has been said so far coupled with the instructive references to other parts of this thesis, one can simply stress that appointments of whatever form in Cameroon are not ratified in any way. The National Assembly itself is subordinate to the presidential will. This:[61]

> obedient position of the legislature was in part a result of the constitution and in part a result of the nomination and legislative electoral process. Because there was no real separation of powers in the constitution, the president could play an important role in the legislative process through his ability to propose legislation and to delay or prevent the passage of legislation he did not like. Moreover, in many instances he had the power to legislate by decree without reference to the National Assembly and even could declare a state of emergency on his own and rule entirely by decree. The president, moreover, did not need to seek legislative approval of his appointments: He appointed his ministers, his governors, *his judges alone, and they in turn were entirely dependent upon him and his favor if they were to remain in office*. The National Assembly had no role to play in the process and could exert no pressure on it. *Of course, this made the appointed judiciary subservient to presidential will.*

It should be noted that the past tense is used not because the situation has changed but simply because at the time Delancey was writing about (late) President Ahmadou Ahidjo, he was no longer in power. The situation is no different now; and these words still apply, with the present tense substituted for the past, because:[62]

> in many respects Biya did not alter the system he *inherited*, he

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[61] Delancey, *supra*, note 8. My emphasis.

[62] *Ibid.* at 70. My emphasis for purposes evident from 4.2.2. note 60. Compare 2.1.3. note 14.

> merely tried to make it operate more effectively. The old laws and decrees remained in place and the ability of the president to concentrate all power and authority in himself remained. Just as he had ordered the police to relax, so too he could order them to tighten up. One significant change was undertaken- the post of prime minister was eliminated and a new succession process established...[which] increased the centrality of the president.

The reader needs only to be reminded here that the President of "federal" Cameroon, while guarding the judicial authority's independence,[63] also appointed the members of the judiciary of the *federated* states with the assistance and advice of the Federal Council of Magistracy (FCM). This Council also acted as the Disciplinary Council for such judges, in accordance with article 32 of the federal constitution. The composition of the FCM, its organization and operation were, as usual, "to be governed by a federal law".[64]

In 1972, when "federal" Cameroon ceased to exist, the above provision became article 31(2), (3) and (4), with the phrase, (he appoints) "members of the judiciary of the federated states" becoming simply (he appoints) "to the bench and the legal services". The President, since then, is assisted, not by the FCM (which disappeared with the federation), but by the HJC just discussed above, which is headed by the president himself.[65] Both the judiciary and the

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[63] As canvassed in 3.4.2.

[64] See 2.1.3. note 9.

[65] The arguments in 3.4.2. (below note 123), and in 2.2.3. (between notes 70 & 78) are valid here as well. There would, thus, be no differences between this and the English kings- Frederick II, Lewis IX, Henry III, Edward I, and Alfonso the Wise- who had their personal inner council, on the advice of which "they acted, judged, legislated, and taxed when they could, and the abuse of this was not yet prevented by any constitutional check." Per W. Stubbs, "The National Assembly of the Three Estates" in G.P. Bodet, ed., *Early English Parliaments: High Courts, Royal Councils, or Representative Assemblies?* (Boston: D.C. Heath and Company, 1968), 1 at 3. See also W.B. Gwyn, *The Meaning of the Separation of Powers: An*

Higher Judicial Council are "to be regulated as to procedure and otherwise by law." And that law, as indicated in Chapter Two, is a presidential decree.

5.3.4. Recommendation

We have just surveyed the dilemma confronted in selecting the judges, one category of society's governing elites. There is, obviously, a pressing need for a plan that would preserve the informed and intelligent choice- which is the strong point of the appointive system[66]- and yet reserve for the voters some form of ultimate control and some substantial part in the process.[67] If such a plan could be formulated, it "not only would go far toward solving the dilemma but also should commend itself to sincere advocates of both appointment and election of judges."[68] What needs to be done is to devise and develop mechanisms that surround the appointive system with further safeguards which will insure the appointment of only qualified persons[69] while properly leaving "the selection of public officials, judges or otherwise, to the employers who will pay their salaries and who, under our system of

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Analysis of the Origin to the Adoption of the United States Constitution (The Hague: Martinus Nijhoff, 1965) at 10.

[66] Though it is completely absent in Cameroon for reasons already evoked in earlier Chapters, but in the last two Chapters in particular.

[67] Which, as noted again, is unknown in Cameroon, a country where even none of the other "governing elites" are actually elected.

[68] Tenure, *supra*, note 27 at 24.

[69] See Klots, *supra*, note 16 at 84.

constitutional liberty, have the ultimate *right* to select them anyway."[70] What, then, are these requirements that make a candidate qualified?

5.4.0. RECRUITMENT QUALIFICATION

Is any special training required for judges? Are there special requirements for certain courts, either formal or informal? Are there any lay judges, say at the lowest levels[71] and how are they selected? In lateral entry systems, do certain occupations, for instance legal academia, provide expedited access to the bench?[72] Most of these questions have already been answered at least partially. The answer to some will come out in the course of the treatment here, beginning with Canada.

5.4.1. The Canadian Position

As noted earlier, Canada follows the Anglo-American tradition of heavily recruiting from the Bar and from among law teachers. Russell explains how, long ago, the selection process in the country "was not exactly a talent hunt" because prime minsters and justice ministers in making appointments were highly susceptible to pressures from their federal and provincial friends.[73] As to professional qualifications, there were none, Quebec apart, for provincial court appointments. But there has been an upgrading of the provincially appointed judiciary.[74] Generally, as the system relies heavily on the bar, it is only natural that membership in the legal profession is a formal condition of eligibility for appointment in this country. It is a constitutional requirement for section 96 judges.

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[70] Golomb, *supra*, note 24 at 77. Emphasis is in original text.

[71] See Chapter Three at note 12. Today, in Canada, only the province of Newfoundland still appoints lay judges to its Provincial Court, and in these instances sends the appointee to law school after a period of three years on the bench. See Baar, *supra*, note 17 at 59. Most of Cameroon's judges are ex-officers of the colonial administration with no legal knowledge. The most awkward part of it all is that "[m]ost trial courts in Cameroon and other parts of French Africa were one-man courts. Not only did the bench consist of one magistrate, but this one man, also called a 'polyvalent magistrate', performed in addition to his judicial task the functions of the 'procureur de la république' and the juge d'instruction' and 'examining magistrate'. These two posts can only be imprecisely translated as 'prosecutor' and 'examining magistrate'. The non-adversarial French procedure assigns them functions and positions which are quite different from the English procedural system." Per P. Bringer "The Abiding Influence of English and French Criminal Law in One African Country: Some Remarks Regarding the Machinery of Criminal Justice in Cameroon" (1981) 25 *J.A.L.* No.1, 1 at 3. Compare 4.1.3. note 32.

[72] See Waltman, *supra*, note 1.

According to Russell, much is to be gained by promoting outstanding judges from lower courts of the provinces and territories because recruitment of able lawyers to provincially appointed courts will be impeded if appointments at that level were to be regarded as a dead-end beyond which promotion is virtually unheard of. He argues strongly for the development of a merit selection system for both levels of provincial courts because of the possibility of partisan political influence on the judicial selection for promotion of able lower court judges to the county, district, or superior courts of a province.[75] This is because the party in power in Ottawa (the national capital) may not necessarily be the same one as in the provincial capital, especially in Quebec.[76] There is certainly, as noted, more to selecting qualified judges than "looking for lawyers with copybook virtues"[77] as is the case in Cameroon.

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[73] *Supra*, note 7 at 137. Russell even gives cases of three justice ministers who engineered their own appointment to the Supreme Court bench and another, Charles Fitzpatrick, to the chief justiceship. The situation is now much different however. See Dickson, *supra*, note 45 at 15.

[74] Russell, *ibid*. at 136.

[75] *Ibid*. at 137.

[76] Baar, *supra*, note 17 at 59.

5.4.2. The Cameroonian Position

Dr. Anyangwe discusses, in some considerable detail, the recruitment and discipline of judges in Cameroon. The country's judges are recruited from law graduates through what is known as *concour d'entrer à l'ENAM*.[78] Thus, about six years from secondary school are required to train a Cameroonian judge. A judgeship or *être magistrat* in Cameroon is attained by presidential appointment after ENAM, and is "based on paper qualification rather than on experience and moral rectitude".[79] There is no distinction in the method of recruitment between superior courts and inferior ones in Cameroon. Dr. Anyangwe's comparative figures show that the Cameroonian magistracy is still numerically small, male-dominated, with young single persons of between twenty-six and forty years of age. These features contribute enormously to the low esteem the public has of the profession, not only because these young people are irresponsible, and lack the courage, boldness and initiative that the profession demands but also because the recruitment process places emphasis solely on "mere book intelligence" of the candidates to the total neglect of his or her "bearing, moral outlook, and general appearance."[80]

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[77] Rosenburg, *supra*, note 3 at 3.

[78] This *École Nationale de l'Administration et de la Magistrature*, as seen in Chapter Two, is "is run mainly by French professors and practitioners of law; the West Cameroon 'English' law and legal practice seem to be widely neglected. When I visited the library of that school in May, 1978, I could not find one single English book." Per Bringer, *supra*, note 71 at 8-9. [2.1.3. note 16]

[79] Anyangwe, *supra*, note 12 at 9, 8. This contrasts with *supra*, note 2. See 2.2.3. note 95. For an incisive discussion of the pattern as it applies in France- from where Cameroon blindly copies- and which "is followed *with modification* in Italy, Belgium, and, indeed, in most of the Continent of Europe as well as in certain other countries of the world",: see Stason, *supra*, note 13 at 48. My emphasis.

Apart from these ENAM *diplômés*, certain other persons qualify (by presidential decree) for direct appointment to the bench. These are: (1) "servants of the state and of law", (2) practising lawyers, and (3) law teachers in the university. Members of the last two categories are hardly, if ever, appointed because, while the former consider it a burial ground (in terms of both finance, status and freedom), the requirements to be met by the latter (who would have readily accepted it)[81] are simply "unrealistic and undefendable."[82]

Let us now leave these other professionals and go back to our "younger members of the legal profession" who "deliberately train themselves to become judges and embark upon a career of judicial service, starting at the lowest rungs of the ladder and climbing as fast and as far as their abilities will permit."[83]

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[80] Anyangwe, *ibid*. at 4. The reason "seems also to lie partially in the nature of the training at the professional school for judicial officers, where a course-book about rules of professional etiquette expends just one page on the forms of judicial behaviour in relation with the general public, but dedicates ten pages to a detailed description of the magistrates' and judges' social and official rank within the modern state elite." Per Bringer, *supra*, note 71 at 11, citing Darge, *Practique Judiciare Camerounaise: Déotologie du Magistrat* (Yaoundé, 1972) at 9 & 67-76. All this is part of the deliberate process by which the judiciary's influence is undermined in the country. See **1.1.3.** note 23.

[81] As those of them who were not in practice long ago are now barred by legislation from doing so: see **3.3.1.(a)** in note 66.

[82] Anyangwe, *supra*, note 12 at 12-13. The decree specifying all these categories and conditions we have seen in **3.3.1.(a)** note 62. The relevant section of the decree is 14(4).

[83] Stason, *supra*, note 13 at 48.

5.5.0. CAREER PATTERN AND PROMOTION.

Career pattern and promotion, like the status and role of the judiciary seen in Chapter Two, cannot be conveniently separated and kept in water-tight compartments. They will be separated here solely for convenience. Their pragmatic inseparability should, therefore, be borne in mind. We will begin with career pattern.

5.5.1. Career Pattern

Discussing this aspect in his very instructive treatise on the judiciary as a third branch of government in Canada, Peter Russell compares the French continental- from which (we have seen) Cameroon heavily draws- and Canadian systems. He indicates that the continental career system, in which promotions are an expected feature of a judicial career, is to be frowned upon as a clear means of undermining judicial independence and impartiality.[84] The system diminishes judicial impartiality and independence unlike in the English common law system (followed in Canada) of judicial recruitment from leading members of the Bar. The Canadian system produces more independent-minded judges first, because the lawyer-judges[85] spend a good portion of their career in the private sector, often representing those who oppose the government. The second reason is that, once appointed, they are not at the bottom of the ladder and are not, therefore, under pressure to ingratiate themselves with the authorities who control their career progress.[86] The judiciary in Canada, as in Britain and the United States, is, thus, still not a professional career of its own. The result is far greater harmony between the Bench and the bar than exists in any of the countries which have followed the Roman tradition of a separate professional judiciary.[87] Loewenstein was quite right in concluding that this harmony is absent in Cameroon, where the Bar, which is not headed by the Attorney General, is in simply a trade union or syndicate of private lawyers. This has rendered it weak and "is no small contributory factor to the strained relations between the Bar and the Department of Public Prosecutions."[88] To a Cameroonian judge, therefore, to be moved from the bench to the DPP is promotion rather than the reverse.

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[84] *Supra*, note 7 at 110-112. See to the same effect, Anyangwe, *supra*, note 12 at x-xi & 36. "This fashion of recruiting magistrates and judges has a pervasive and lasting negative consequences for the...Cameroon judiciary as to its quality, social reputation and authority in relation with the government." Per Bringer, *supra*, note 71 at 4.

[85] Contrast these with Cameroon's prosecutor judges (2.2.3. note 85 & 3.3.1. note 56).

5.5.2. Promotions

The Canadian formula should not be pressed too far because a more cautious examination of lawyers' backgrounds in Canada reveals some significant pre-appointment political links with government. It "would be a miracle if it were otherwise."[89] Again, while there is no regular career ladder within the Canadian judicial system, promotions do occur, particularly within the section 96 courts, that is, at the higher court levels.[90] There is another factor which narrows the difference between the continental civil law system and the traditional Canadian system. This is the recognition of the need for judicial education and training.[91] Moreover, the establishment of judicial councils at both federal and provincial levels in Canada helps to emphasize the judiciary as a distinct profession, and, thus, draws it nearer to the continental model.[92]

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[86] Russell, *supra*, note 7 at 110. Also see Baar, *supra*, note 17 at 60-61, 63. This ingratiation, we have seen, is just what is aimed at in Cameroon.

[87] K. Loewenstein, *British Cabinet Government* (London: Oxford University Press, 1967) at 169. See also Anyangwe, *supra*, note 12 at 36.

[88] Anyangwe, *ibid.* at 114. This should be coupled with **3.3.1.(a)** notes 72 to 75. Weakening the bar, as we have seen, is one of the ways Cameroon curbs its problem of judicial dependence (**3.4.2.** text to note 145). The stature of the magistracy and judiciary is further severely weakened by "internal friction within the East Cameroon bench and tensions between East Cameroon and West Cameroon judges due to different patterns and levels of education and qualifications": Bringer, *supra*, note 71 at 4.

As indicated, members of Cameroon's judicial and legal services are appointed to, rise in, and are promoted from a career service which is an adjunct of the general civil service.[93] In this country, two promotion lists are drawn up on July 1 of each year: one by the Promotion Board and the other by HJC for judges. It is too intricate a process to be exhaustively explained in this thesis. The essential thing to note is that the complexity is not for the judge's protection but solely for making preys of those of them who might want to show creativity and boldness. For example, in considering whether or not to promote the HJC (like the Promotion Board) is guided mainly by the annual reports and opinions of the authorities empowered[94] to report on the officers.[95] The entire set-up, as already indicated, is a very efficient means for undermining judicial independence not only because of what has just been exposed, but also because:[96]

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[89] Russell, *supra*, note 7 at 110. Compare *supra*, notes 17, 19, 24, & 42.

[90] *Ibid.* at 136. There has been a merger of some of the levels in six of the common law provinces: with only Ontario, British Columbia, and Nova Scotia still having the traditional three levels of courts.

[91] *Ibid.* at 111. See also Chief Justice Dickson, *supra*, note 45 at 16-18. The Chief Justice states that the judge's merit and ability to fulfilling his or her function of dispensing justice should not be limited to the selection stage but must be "a matter of continuing concern throughout a judge's career. A judge must have the facilities and opportunity to keep his or her knowledge of the law up to date, and to be aware of the commentary and the not infrequent criticisms or suggestions offered by legal scholars. This is especially true as we enter the unchartered waters of the *Charter*." (at 16). Contrast **4.3.1.(b)** and **3.3.1.(b)** (on the question of commentary by legal scholars). To say that there are numerous occasions for judges in canada (e.g. judges conferences) for judges' continuing training and education, is only to state the obvious. On the other hand, judges and prosecutors in Anglophone and Francophone Cameroon live professionally cloistered lives, with barely a nodding acquaintance with each other's legal system. What is even stranger, is that (with the exception of very few Anglophones) most of them have never set foot in courts operating in the other system. It is, indeed, a pity "that no programme exists for such exchanges. What is even more, the young legal probationer at the School of Magistracy gets his practical training and forensic experience in Anglophone Cameroon if he is Anglophone and in Francophone Cameroon if he is Francophone. This has only gone to reinforce deep-rooted parochialism and prejudices." Per Anyangwe, *supra*, note 12 at 5. It is submitted that this would be one of the invaluable occasions for talking "national unity" if it is not to be a mere empty phrase. See **3.2.2.** note 25.

[92] Russell, *ibid.* at 135.

> it would be a corrupting thing for a magistrate or a judge to be in a position in which he could use his judicial office politically to advance his own promotion.

There is, therefore, no *regular* system of promotions within the Canadian judicial system. There is, however, only what is called "elevation", which means moving a judge from the provincially appointed lower courts to the higher section 96 courts; the proportion of such judges has been insignificantly small. This phenomenon is not unique to Canada; it is common in other common law countries. The important thing is that it does not, and is not designed solely to, endanger judicial independence as is poignantly the case in Cameroon and the other countries relying on the career system.[97] Nevertheless, in Canada:[98]

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[93] See 2.1.3. note 7.

[94] And they are, indeed, numerous: procureur general, minister, president of supreme court, procureur general of supreme court, procureur general of court of appeal, directors of the ministry of justice, presidents of courts, police and gendarmes; all their recommendations are to be in before March 15 of each year. And, awkwardly, most of these reporters, it must be noted, are also members of the Board and/or Council.

[95] See Anyangwe, *supra*, note 12 at 40.

[96] Per McRuer, former Ontario High Court Chief Justice: Royal Commission of Inquiry into Civil Rights (Ontario), Report, at 540, quoted in Russell, *supra*, note 7 at 135. These commissions enormously contrast with those in 3.3.1.(a) note 59.

> it must be admitted that the risk is still there and apt to become greater under the Charter of Rights when there is more at stake for the government in the work of the courts.

This lingering danger is nowhere more potent than in the sphere of judicial remuneration.

5.6.0. JUDICIAL REMUNERATION.

The remuneration of judges is an essential issue in the discussion of judicial independence. The appointing process is "only one of the key variables in determining the composition of the third branch of government."[99] Though both countries are compared and contrasted, we will, for purposes of discussion, examine separately the case of Canada and then Cameroon's.

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[97] These other states do not, however, exaggerate it as much as Cameroon does. For example, the case of Italy has been noted above. In France, the filling of vacancies with respect to both original appointments and promotions is the responsibility of the Minister of Justice. But he is restricted, at least, in making the appointments to the panel of three candidates for each vacancy proposed to him by "the highly qualified judiciary commission.": Stason, *supra*, note 13 at 48.

[98] Russell, *supra*, note 7 at 137. Compare *supra*, note 57.

[99] *Ibid*. at 149. Judges, like every other professional, enter the profession "in order to secure their economic interests.": *ibid*. Compare and contrast this with Denning, *supra*, note 5 at viii, warning: "There are many things to discourage the young people of to-day. The period of waiting is long. The financial rewards are not as great as they used to be. But the work is still the most honourable of any. It is much to be hoped that there will never be wanting a due succession of persons to carry on the great traditions of our English legal system."

5.6.1. Remuneration of Canadian Judges

As with appointment, judges' remuneration in Canada assumes two aspects, namely, that of federally-appointed judges and that of provincially-appointed judges.

5.6.1.(a) Remuneration of Federally Appointed Judges

Section 100 of the *Constitution Act, 1867* specifically states that Parliament is to fix and provide the salaries of judges. The level of these payments is provided for in the *Judges Act*.[100]

Judicial remuneration must be at a sufficient level to attract the most able candidates to the Bench.[101] This was not the case in Canada until 1929[102] but has since changed. Professor Russell, however, makes it clear that the judges' situation, at the time in question, was true only to the extent of putting them *en comparison* with successful lawyers, and not as compared to ordinary Canadians- a comparison which would be irrelevant to the issue anyway. But though their financial or economic position *vis-à-vis* those lawyers is inferior, Russell has gone further to demonstrate some advantages[103] which partially offset the economic opportunities that are ostensibly lost on leaving private practice for the bench.[104]

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[100] R.S.C. 1970, c.J-1. This is very unlike in Cameroon. See 2.2.3. (paragraph below note 90).

[101] Justice Dickson, *supra*, note 45 at 14-15.

[102] *Ibid.* at 15. See also Russell, *supra*, note 7 at 137. But the latter author (at 149) puts the date at "until 1932" and says the situation (i.e., of the impossibility of attracting "the best legal minds in Canada" to the bench) was still the same "fifty years later."

[103] Such as pension and benefits for judges' surviving spouse and children, no nervous strain (though job is arduous as seen in Chapter Two), secure work and income, considerable social prestige (which is starkly absent in Cameroon as already noted), and the satisfaction of performing such an important civic

There are not only positive factors attaching to judicial duties however. The negative ones include the tiresome and repetitive nature of the job and loss of participation in active political life.[105] On the whole, Russell's analysis and portrayal reveal that federally-appointed judges in Canada do not fare badly, especially in comparison to their brothers and sisters in the U.S. In addition, Russell believes the establishment of the Commissioner of Federal Judicial Affairs in 1977 "moves Canada closer to both England and the United States."[106]

Section 100 has occasioned heated litigation. This turns on the phrase "fixed and provided by Parliament" in the section, which also makes it very clear that the federally-appointed judges are to be paid from funds voted by

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function. Compare Lord Denning in note 99 above.

[104] See Russell, *supra*, note 7 at 149, 151. A *magistrat* in Cameroon, as noted above, celebrates ("*arouser*") his or her appointment more joyfully when it is to the legal department or DPP (*magistrat debout*) than when it is to the bench, for obvious reasons. See 2.2.3. text between notes 90 & 94; and see what comes below.

[105] On the contrary, and in spite of the prohibition (see note 6 above) and of the Berger affair (see 3.1.1. note 4), their Cameroonian friends *must* be party-card carriers as well as party-uniform wearers if they must keep their job. Compare **3.3.1(a)**, especially notes 58 and 63. How do we explain this phenomenon (i.e. the prohibition and the reality)? The answer might be what one commentator suggests, namely, that Cameroon is "a nation where, deliberately or otherwise, the political cart is placed before the horse." Per R.B. Sanjo, "Did Ahidjo, Biya Suppress Foncha's Plan for an Anglophone University?" *Le Messager* No.029 (July 18, 1991), 10. Some other authors give the one-party system as the explanation. See Anyangwe, *supra*, note 12 at 67-70; P.T. George, "The Court in the Tanzania One-party System" in Sawyer, ed., *East African Law and Social Change* (1967) at 44-45, discussed in Anyangwe, *ibid* at 68; and Wambali and Peter, *supra*, note 2 at 135-136.

[106] *Supra*, note 7 at 156. His comparable salaries is found at 153-154.

Parliament. This insistence protects the judiciary from the executive's ability to jeopardize judicial independence through reductions or increases of judges' salary. The section has often been interpreted to mean that it would be unconstitutional to reduce judicial salaries even by a statute enacted by the federal Parliament. Professor Hogg, one of Canada's leading constitutional authorities, finds this view "not correct"; the better view is "that this language does not prohibit a reduction in judicial salaries."[107]

The introduction of required contributions by judges to their pension plan[108] in 1975 raised a tremendous hue and cry from the legal profession generally and especially from the judges who "attacked [it] as a violation of the principle of judicial independence."[109] The issue came up to the courts in *Beauregard* v. *The Queen*.[110] The Supreme Court unanimously rejected the ruling of the lower court[111] that section 100 did not authorize legislation requiring judges to contribute to their pension plan, because "Canadian judges are Canadian citizens and must bear their fair share of the burden of administering the country."[112]

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[107] *Supra*, note 10 at 137 n.20.

[108] By the Statute Law (Superannuation) Amendment Bill. The issues of judicial pensions, salaries, etc. have been the subject of several commissions, report, and legislation in Canada. For further discussion, see Russell, *supra*, note 7 at 152ff; and *Rapport et Recommendation de la Commission de 1986 sur le Traitement et les Avantages de Juges, le 27 Février 1987, présenté au ministre de la Justice du Canada* [hereinafter *Rapport et Recommendation*] especially at 3.

[109] Russell, *ibid.* at 155. This contrasts with the attitude of Cameroon's lawyers in **3.3.1.(a)**.

[110] (1983), 148 D.L.R. (3d) 205 (Fed. C.A.).

[111] See **3.2.0.** note 12.

In a system of responsible government, which Canada has, this decision would certainly open the way to the ability of the executive to undermine the provision of judicial independence by relying "upon Parliament to do its bidding". It is quite true that the possibility lingers on, especially as indicated in the concluding lines of the last section on promotions. Mallory indicates how the Government controls the House of Commons (which "is becoming a sort of constitutional vermiform appendix"[113]) rather than the reverse, and declares that "it is an illusion to think of the House of Commons [as] being able to make or destroy a government at *any time*...because [its] members...are not players in the game but part of the score-board."[114] Generally speaking, however, the opposition in Canada is still stormy. If the government tries to tamper with judicial independence through improper reduction of judicial salaries, that government exposes itself to violent attacks from not only both the opposition and the press but from the Courts themselves.[115]

Moreover, the *Judges Act* was amended in 1981 to create a body, independent of Parliament and government, to review every three years, the question of judicial remuneration.[116] Judicial independence in this regard was also reinforced by the establishment of the Office of the Commissioner for Federal Judicial Affairs in 1977. This Commissioner replaced the Department of Justice in the administration of personnel matters with respect to all federally appointed judges. Judges of the Supreme Court of Canada are not covered by this. Instead, they are placed under the responsibility of the Registrar of the Court. The Office of the Commissioner stands between the judges and government officials with whom they inevitably would have been dealing personally in certain matters- such as Cameroon's judges do when they make the "pilgrimage to Yaounde Ministry of Finance".[117] The self-evident rationale for a bulwark in the Canadian polity is, of course, that judges ought not to be negotiating these matters with the very officials whose departments frequently appear in cases before them.[118]

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[112] [1986] 2 S.C.R. 56 at 76. See also *Rapport et Recommendation*, *supra*, note 108 at 15-16. Compare **3.5.1.** note 153.

[113] *Supra*, note 42 at 272, 215.

[114] *Ibid*. at 272. My emphasis.

[115] Hogg, *supra*, note 10 at 137. See also **3.2.0.** especially at note 12, and **3.2.3.** The Canadian Opposition still plays an important role in checking the government and is often consulted on major government decisions. There is even another *real* opposition in the provincial capitals. See Mallory, *supra*, note 42 at 62 n.46, 282, 220.

These are just a few brief examples which go to illustrate how judicial independence is a matter of constant concern to Canadians. Let us now look at the situation of the provincial judges.

5.6.1.(b) Remuneration of Provincially-Appointed Judges.

Some concern has been expressed in regard to the remuneration of provincially appointed judges. Not in regard to their independence, however.

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[116] See Justice Dickson, *supra*, note 45 at 14-15. The amending legislation is R.S. c.J-1 (assented to 18th March, 1981), section 19.3.

[117] See 5.6.2. below (i.e. note 131).

[118] See Russell, *supra*, note 7 at 156.

Their tenure, as noted above, is also guaranteed. The problem is that there exists a large gap between their remuneration and that of their federally appointed colleagues. This gap, even though narrowed in the seventies, is still a matter for concern. It has been shown that the adjudicator's quality may bear some relationship to his or her remuneration. The reduction in the systematic differential between the remuneration of provincially and federally appointed judges has been advocated, therefore, as the existing large gap "remains highly questionable."[119] These provincially appointed judges have to be accorded equal status and remuneration as federally appointed trial judges because of the "ugly episode" which resulted from the absence of a buffer, like the Commissioner of Federal Affairs, between provincial judges and the executive branch. The present situation simply "does not inspire confidence in a system that makes judicial salaries so dependent on executive discretion".[120] This is especially so in view of the executive domination of the legislature just noted.

It has been suggested, therefore, that, through the *Judges Act*, the basic salary level be fixed and that provision for periodic reviews and automatic annual increases be made. By doing so, there would be "more accountability and less likelihood of continual political rancour."[121] The main problem these provincially appointed judges face in this area, according to Russell, is not procedural but merely due to a failure on the part of provincial governments to be persuaded that the work these judges do is as challenging, as important to society, and as deserving of the same level of remuneration as that of the federally appointed judges.[122]

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[119] *Ibid.* at 157.

[120] *Ibid.* at 159.

[121] *Ibid.*

If the differences between the personnel arrangement of provincially and federally appointed judges are questionable, the treatment of the lowest locally appointed adjudicator, the justice of the peace, is "even more dubious".[123] Events resulting from the *Currie* case[124] established that:[125]

> justices of the peace who performed significant judicial functions are not to be treated like minor bureaucratic functionaries but must enjoy at least the minimal conditions of judicial office.

Government officials in Cameroon would seem to go through all these arguments and explanations with a lot of impatience. To Cameroon, the matter is simple. It is a waste of time not only as regards its lowest appointed adjudicator but *all* its adjudicators. It makes no distinction between them.

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[122] *Ibid.*

[123] *Ibid.* at 160. This dubiosity is even heightened when we come to consider that these justices of the peace perform "wide-ranging duties, functioning as the bottom rung of Canada's judicial system. They relieve provincial court judges of many minor tasks that otherwise could have devoured valuable court time.": D. Shoalts, "Image Doesn't Do J.P.s Justice- Judicial Duties Go Far Beyond Civil Marriages" *Globe and Mail* (Toronto) (September 17, 1991), A4.

[124] See Chapter Three at note 12.

[125] Russell, *supra*, note 7 at 160.

5.6.2. Remuneration of Cameroonian Judges

The appalling situation of the Canadian Court *before* 1882[126] resembles that of its counterpart in Cameroon today.[127]

Salaries of judges in Cameroon, while not being provided for by Parliament, are aligned to those of other civil servants, with automatic increment after every two years. The legislative method of determining judicial salaries, though periodic, has the advantage of exposing the process to public scrutiny and discussion.[128] But, as we have seen in previous Chapters, even if the present Cameroonian constitution made a similar provision, it will still be just as meaningless as the human rights guarantees in the preamble of that document. It will, in the end, still be what the *Président de la République* decrees it to be, since the country's National Assembly merely dances to his tune.

Salaries of Cameroonian judges are simply "far from commensurate with the responsibilities and prestige of judicial office, and far lower than comparable positions in the private and para-public sectors."[129] Moreover, allowances paid to civil servants of comparable rank are, in fact, higher than theirs. No one would then doubt the nexus between low salaries and susceptibility to corruption and injudiciousness.[130] As if to worsen an already unfortunate situation, these "far from commensurate" salaries, from the government treasury, are paid into the judges' various bank accounts like those of every other civil servant. This means that the judge, too, must make the *normal* "pilgrimage to Yaounde Ministry of Finance to iron out things the way he best can in its regard."[131] If the remuneration of these Cameroonian judges is questionable, their tenure is even more dubious.

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[126] As to which, see Snell and Vaugan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) at 174, referred to by Russell, *ibid.* at 137. See the tumble-over house allotted to the President of the "misnamed" Supreme Court of Cameroon as discussed in Chapter Two (in the text preceding note 95).

[127] See 2.1.3.

[128] Russell, *supra*, note 7 at 151.

[129] Anyangwe, *supra*, note 12 at xi. Compare 3.1.1. note 5

5.7.0. TENURE AND TERMINATION OF JUDICIAL OFFICE.

Whenever we talk about judicial tenure we often, if not always, think of it principally in terms reminiscent of our attitude to the state's duty to the people- negative duties.[132] Bringing it to the judiciary's tenure, this is translated into the protection of judges from interference or pressure that might undermine their independence. But it is important that we do not always do this to the extent of forgetting the other side of the coin; namely, how to ensure that these judges are responsible to the society they serve and are professionally competent.[133] Tenure, therefore, must not:[134]

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[130] Dr. Anyangwe has, therefore, suggested substantial increases in these salaries, the provision of decent and furnished accommodation according to rank, and official cars to all Appeal and Supreme Court judges. He also advocates for the Chief Justice of the Supreme Court to be made third- after the Head of State and the President (Speaker) of the National Assembly- in official protocol: *ibid*. at 33. It would be surprising to Canadians to hear that the chief justice of the supreme court in this country is in a coordinate position with the Attorney General of the same court.(*ibid*. at 41). In reality, however, it is the latter who is superior: see **2.2.3.** (between notes 90 & 92).

[131] *Ibid*. at 38-39. Compare **2.2.3.** (Judge Nyo' Wakai's last answer between notes 96 & 97).

[132] Thus, even though the focus in this thesis is more on *no unnecessary* state *interference*, it shares the view that the state's primary task in respecting individuals is not fulfilled *only* through non-interference with individuals and the respect for negative rights of individuals. See A. Acorn, "Consensus and Difference in a Women's Agenda for Constitutional Reform" in D. Schneiderman, ed., *Conversations* (Edmonton, Alberta: Centre for Constitutional Studies, 1992), 25 at 26; and S. Bandes, "The Negative Constitution: A Critique" (1990) 88 Mich. L. Rev. 2271 at 2346-47, 2273-74. Compare *DeShanney* v. *Winnebago Department of Social Services* (1989) 109 S.Ct. 998 at 1003-04, per Rehnquist J.

> become so secure that judges are insulated from any kind of accountability to the public they serve and hold office regardless of their capacity to perform their function well.

We will examine tenure (their protection) first before looking at termination (protecting society from their incompetence), always bearing in mind that the mode of effecting the second affects the first to an extent.

5.7.1. Judicial Tenure.

Tenure is, no doubt, an important feature of judicial independence. A judge should enjoy immunity because he (or she):[135]

> does not have to weigh and measure his words or look across his shoulders so as to satisfy himself that by saying or doing what he is about to say or do, he is not exposing himself to any legal action or political and administrative reprisal. Surely, justice cannot be rendered impartially to all manner of man without fear or favour or malice if "though clad with judicial amour and armed with the sword of justice, the judge is made to work with the Sword of Damocles dangling over his head.

5.7.2. The Tenure of Canadian Judges

As noted already above, and in Chapter Three, judges in Canada generally have a secure tenure, the security of which increases with the court level.

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[133] See 4.3.3. and 3.2.1.

[134] Russell, *supra*, note 7 at 173.

[135] Anyangwe, *supra*, note 12 at 33.

5.7.2.(a) Superior Court (Federally-Appointed) Judges

The reason for a secure judicial tenure just advanced sufficiently justifies *l'inamovibilité* (section 99), which is firmly enshrined and respected in Canada. It is axiomatic because:[136]

> *un pouvoir judiciare fort et indépendent est simplement irréaliste si la charge d'un juge dépend de savoir si ses décisions et sa façon d'aborder le droit plaisent au gouvernement du jour. Sans l'inamovibilité, ni l'apparence ni la réalité d'une justice impartiale ne seraient possibles. Nous avons la chance qu'au Canada, l'inamovibilité des juges de cours supérieures soit garantie par la Constitution.*

All federally appointed judges and almost all provincially appointed judges in Canada serve during good behaviour. This is to say, they hold lifetime appointments and are removable only for cause or upon reaching the mandatory retirement age.[137]

5.7.2.(b) Provincially-Appointed Judges

Justice Deschênes has reviewed the situation of the provincially appointed judges in Canada in his incisive study.[138] The findings of this study have led Hogg to conclude that a guarantee of tenure during good behaviour in most provinces has been supplemented by the establishment of a judicial council. That is to say, a committee of *judges* with power to inquire into complaints against judges and make recommendations as a precondition to disciplinary action.[139]

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[136] Justice Dickson, *Supra*, note 45 at 14. It is just another way of saying what Anyangwe says before him, with the only addition that he makes it very clear in the last sentence that "We in Canada are very fortunate to have constitutionally guaranteed tenure for our superior court judges." It is worth noting that Justice Dickson's address alternates between English and French without any warning or loss of flow. The impression is unambiguously given that most, if not all, justices of the Supreme Court of Canada are bilingual. (This writer cannot hide his admiration and astonishment when he reads through most of the Canadian Supreme Court's decisions reported in both languages.) On the other hand, with the exception of very few Anglophones, *all* of Cameroon's judges (court level irrelevant) are not only monolingual but also, as seen above, mono-jural. The arguments of **4.1.3.** note 32 are valid here, especially in view of what has been said in note 71 above.

[137] Baar, *supra*, note 17 at 64. See 3.2.0. note 15. Retirement is treated below (5.7.5.).

[138] See J. Deschênes, *Maîtres Chez-Eux* [Masters in Their Own House]: *Une Étude sur l'Administration Judiciare autonome des Tribunaux* (Ottawa: Conseil Canadien de la Magistrature, 1981) at 103-124.

R v. *Valente (No.2)*[140] posed the question whether the provincially-appointed judges of the Ontario Provincial Court (Criminal Division) were disqualified from performing their functions by reason of section 11(d) of the *Charter*, as discussed in the second section of Chapter Three of this thesis. The argument was based on the degree of control exercised by the provincial Attorney General (A-G) over the judges. This control raised a reasonable doubt of their impartiality. The problem, however, was not that of insecure tenure, since the judges had a statutory guarantee of it during good behaviour to the mandatory retirement age of 65 years. The crux of the matter rather hinged on a host of minor ways in which these judges remained subject to the executive power- their being appointed by the A-G, who had discretion: to reappoint those of them who had reached retiring age, to designate a (higher-paid) "senior judge",[141] to authorize leaves of absence, and to authorize paid extra-judicial work; their salaries were fixed by order in council, not by statute; and pensions were provided out of the general provincial civil service plan, not a special judges' plan.

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[139] Hogg, *supra*, note 10 at 140 n.34. It is important to note that the Council is composed of judges. This is very unlike the HJC and Permanent Disciplinary Board in Cameroon.

[140] (1983) 41 O.R. (2d) 187 (Ont.C.A).

[141] See "super-scale" salary judges in Cameroon in 3.4.2. (conversation beginning at note 138).

Viewing all these factors (which are very common features in Cameroon), the Ontario Court of Appeal unanimously held that, whether taken singly or collectively, they would not result "in a reasonable apprehension that they would impair the ability of [a Provincial Court judge] to make an independent and impartial adjudication."[142] What *Valente* decides:[143]

> is that the possession by the Attorney General of powers of appointment, payment and administration is not, by itself, a breach of the independence required by s.11(d) of the Charter. If in that case there had been no statutory guarantee of tenure[[144]] to retirement age, or if there had been evidence of the use of executive powers to influence adjudication,[[145]] the decision might well have been different.

It is quite true that the mere fact that the executive exercises powers of appointment, payment and administration should not, *ipso facto*, be taken for a breach of judicial independence. This has been canvassed in the appropriate area above, but another important illustration would not be out of place here.

The United Kingdom, for example, has, as its principal judicial official, the Lord Chancellor. This official, while being the Custodian of the Great Seal, presiding judge of the House of Lords, member of the Judicial Committee of the

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[142] *Supra*, note 140 at 214, quoted in Hogg, *supra*, note 10 at 141. The decision should not be generalized however. In Cameroon, such a finding would be highly exaggerated. See, for example, *supra*, note 13 to the end of that section; and what follows here.

[143] Hogg, *ibid.*

[144] Which is not the case in Cameroon: see 5.7.3. below, and *supra*, note 50.

[145] Which is very common in Cameroon: see 2.2.3. and 3.4.2.

Privy Council, is also a member of Cabinet. Vacancies in the membership of the High Court are filled on his recommendations and he may also appoint and remove judges of certain courts. His position is one of very great power and influence; and he owes his own appointment from the King or Queen who merely confirms the Prime Minister's recommendation. The Lord Chancellor is, therefore, a political officer in a very real sense; since a change of government usually results in the appointment of a new Lord Chancellor- to represent the views of the prevailing party.[146]

The Lord Chancellor's membership:[147]

> [in] all three so-called branches of Government and in the legislature of the Upper and not the Lower House is essential to the conscientious discharge of his responsibilities and to the preservation of the separation of powers, if by that you mean, as to-day you must, the separation of politics from administration of justice and the independence of the judiciary.

Lord Hailsham, therefore, has particularly harsh words for the Americans who, as shown above, do not adhere as steadfastly to their rigid separation of powers as they claim. That kind of separation, Lord Hailsham takes to be simply an indulgence in "self-delusion" because judges, individually or collectively, have neither the clout, the know-how, the leisure nor even the resources to get these very things for themselves. Neither could they hope to get them "within the bounds of separation of powers."[148] But they (judges) succeed in obtaining most of these things in Britain because:[149]

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[146] See Stason, *supra*, note 13 at 46-47.

[147] Lord Hailsham, *supra*, note 18 at 311.

[148] *Ibid.* at 317.

> [l]ike the Holy Trinity, the Lord Chancellor has various functions and powers. Unlike the Holy Trinity, he is the only one person, and because he is the only one person discharging various functions he is the only practical guarantor of the independence of the judiciary from political interference, under a Constitution which as Dicey put it now nearly a century ago, has as its two foundations the Sovereignty of Parliament and the Rule of Law and not simply the separation of powers as in 1722 Montesquieu perceived the results of the Glorious Revolution of 1688 to have been, or as the Founding Fathers of the American Constitution saw them in 1787.

In the British government, the Chief Justice is the second judicial officer, followed by the Master of the Rolls and the President of the Probate, Divorce and Admiralty Division of the High Court. Following at their heels, are seven Law Lords and the Lord Justices of the Appeal. The Prime Minister has authority to fill vacancies in all these positions.[150] But once appointed, judges in that country have all the independence and enjoy the confidence of not only the British people, but also of "the ever-growing world around us."[151]

We immediately realize here that, notwithstanding the political character of the appointing authorities who fill vacancies on the Bench, the British appointive system has functioned with such a high degree of satisfaction that we often hear expressions like: "As impartial as an English judge." That system has worked successfully because of the country's tradition of insisting:[152]

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[149] *Ibid*. This contrasts graphically with Cameroon's *Unholy Trinity*.

[150] Stason, *supra*, note 13 at 47.

[151] Per Sir Winston Churchill: see 3.1.1. note 11.

[152] Stason, *supra*, note 13 at 47-48.

> upon independence and ability on the Bench [which] has successfully prevented the invasion of politics in the invidious sense and has permitted the British people to enjoy the highest type of judicial service.

This last quotation, the findings in *Beauregard*, as well as Lord Hailsham's Holy Trinity all find their exact opposites in Cameroon, with its normal empty constitutional promises.

5.7.3. Tenure of Cameroonian Judges

There is no such distinction, as exists in Canada, between higher and lower judges in Cameroon's very *insecure* judicial tenure. There, a judge- just like her brother of the legal service (no distinction between them, too)- before the retirement age of 55 years (explained below[153]), may be disciplined or removed by the President of the Republic, on advice of Higher Judicial Council, which the president himself heads. And this very judge, subject to the Minister of Justice's disciplinary control, may be transferred and promoted without his consent.[154] More is to be found under the various methods of termination.

5.7.4. TERMINATION.

Termination of judicial office, like most other offices, may come about in one of the following ways. It may be through retirement at the relevant age or through removal. Removal may also be due to several reasons: incapacity to perform function, dismissal for pre-stated professional misconduct, or, as in arbitrary regimes, *relevé de ses fonctions* for no stated reasons.

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[153] **5.7.5.(b).**

[154] See Anyangwe, *supra*, note 12 at x, 41, 15; and 2.1.3. note 7.

5.7.5. Retirement.

We will treat Canada and the Cameroon separately.

5.7.5.(a) In Canada

As noted above, there is now a mandatory retirement age in Canada. The *Constitution Act, 1867*, section 99, in its original language made superior court judges appointed for life, just as they still are in the United Kingdom and United States. The imposition of the mandatory retirement age in Canada had to be effected *only* by a constitutional amendment in 1960. It would have been unconstitutional to do otherwise. The retirement ages are as follows: seventy-five years for Supreme Court of Canada and provincial superior court judges and seventy years for federal, county and district court judges- provided they, in this second category, have served for ten years. For most provincially appointed judges, it is sixty-five years.[155]

5.7.5.(b) In Cameroon

In *la Démocratie Avancée*, the statutory retirement age, as noted, is 55. But it is interesting to note that this was not the original age (if, indeed, one can even talk of an original, in view of the country's distorted history[156]). Let us, however, begin in 1966 when the country became a *de facto*, as well as a *de jure*, one-party state in the most complete sense of the word. *Decree No. 66/DF/205 of 28 April 1966*[157] put the age at 62. Barely four years later the policy of the nation was redefined.[158] *Decree No. 70/DF/253 of June 2, 1970* reduced it to "55 years in the case of officers of the first two scales[[159]] and 60 years in the case of others." That does not end the matter.

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[155] Baar, *supra*, note 17 at 64. See also *supra*, between notes 140 & 141. Canadians, it would seem to Cameroonians, waste a lot of time going through the "cumbersome and antimajoritarian process of constitutional amendment" (Dimond, *supra*, note 38 at 1.) *just* to impose or alter the retirement age of a *mere* judge. To these Cameroonians, however, must be replied: That is what living in a free country is all about.

[156] "[O]f all the elements that make Cameroon a unique case in the political evolution of Africa, is the manner in which the leadership has always succeeded in manipulating the process and achieving the results, in spite of the cleavages that underline the sociopolitical set-up.": M.M. Mensah-Gbadago, "9 Years of Political Transition: From Ahidjo to Biya and the Hayatou Connection- How Far Have We Moved?" *Le Messager* (June 6, 1991), 1 at 4. Mensah-Gbadago gives the 1972 May 20 referendum as the "most

Three weeks after, the second decree (just given) and its retirement age were themselves retired by *Decree No. 70/DF/322 of June 23, 1970,* which mandated that "the age limit for Judicial and Legal Officers shall be the same as for civil servants of category 'A'[[160]] governed by the General Rules and Regulations of the Public Service." By section 5(1)(a) of *Decree No. 74/759 of August 26, 1974* on Civil Pension Scheme, the retirement age for civil servants

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significant of these manipulations...in which Cameroonians were made to opt for a unitary state and this has gone down in history as the most significant date in the political history of Cameroon.": *ibid*. Compare **3.3.3.** note 129.

[157] Everything in the country is the subject of decree, since the *pleins pouvoirs*. Perhaps this is the most important characteristic of an "Advanced Democracy". What is even more, this is a federal state in which liberty and rule of law reigned, as the New Social Order wants us to believe. See "The Gorji-Dinka Concept of a New Social Order" *Le Messager*, *ibid*., 5.

[158] See **3.5.1.** note 157; and **2.2.3.** note 73.

[159] All civil servants are categorized and scaled; with these scales and categories being laid by decrees: for the decree governing judges and their friends of the DPP see **3.3.1.(a)** note 62. These Rules are appended to Anyangwe, *supra*, note 12.

[160] All *magistrats* are in this category. But note should be taken that each category is further categorized into, for example, B.1, B.2,... Note that in the space of three weeks 69 decrees (322 minus 253) had been signed. Compare **2.1.3.** note 9. *C'est vraiement "un pays decrêté"* or "Government by Decree", to borrow from Marguérite Sieghart's book, *Government by Decree* (London: Stevens and Sons Ltd., 1950).

of Categories "A" and "B" is 55 years, and 50 years for those of Categories "C" and "D".

Notwithstanding the statutory retirement age limit, all "*magistrats* are in practice generally retired at 60 or thereabouts, which I believe is proper."[161] No one is here questioning the propriety of the age. What is very much in question is its arbitrary fixing, and the fixer's competence- in view of the fact the country is a "democracy"- coupled with his absolute freedom to alter it, re-alter and what have you.

Retired Cameroonian judges and other civil servants, receive pension benefits, the exact amount of which depends on the length of service of each judge or officer.[162] Most of these judges may not even end their career through retirement (to qualify for these benefits) as they can be removed before the retirement age.

5.7.6. Removal.

5.7.6.(a) In Canada

As already seen, a superior court judge in Canada can only be removed by joint address to the Senate and House of Commons. But the Governor in Council can remove county and district court judges.[163] Professor Hogg does not exactly see why the tenure of county and district court judges should be a matter within federal legislative competence because "[n]owhere in the *Constitution Act, 1867* is it expressly assigned to the federal Parliament",[164] though he thinks Professor Lederman may be right in his argument that:[165]

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[161] Anyangwe, *supra*, note 12 at 4 n.4.

[162] See *ibid.* at 31.

[163] See Judges Act, s. 32 (5) (added by R.S.C. 1970 (2nd Supp.), s.10.

> the cumulative effect of sections 96 to 100 inclusive is to assign by necessary implication to the federal parliament legislative power over the appointment, tenure and removal of provincial superior-court judges, subject to the limitations contained in those sections themselves.

5.7.6.(b) In Cameroon

In Cameroon, no special mode exists for removing a judge. There are some rules in the decree, governing the judicial and legal service, pertaining to disciplinary dismissal, a subject which we examine below. But the important thing of interest here is that a *magistrat* in the country, like any other civil servant, may get up one fine morning, get to work, and during the *midi* break, hear this over the *Journal de Treize Heure*:[166]

> *Par un décret présidentiel [ou arrêt ministériel] signé cet après midi-même: Monsieur X., précédemment juge au tribunal Y. est relevé de ses fonctions*

And that ends the matter as well as his or her career. No reasons. No court can question its propriety. And to the general public and the lawyers, as indicated in Chapter Three, it is that particular judge's problem. It does not "concern" them at all.

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[164] Hogg, *supra*, note 10 at 140 n.33.

[165] *Ibid.*

[166] Translation: "By presidential or ministerial decree," as the case may be, "signed this afternoon, Mr. X., formerly judge of court Y. has been dismissed."

Removal, as noted earlier, can be due to incapacity or serious misconduct.

5.7.7. Incapacity.

By the *Judges Act*[167], a formal mechanism, the Canadian Judicial Council, was established to inquire into complaints against judges of superior, district or county courts and to make disciplinary recommendations. This is just one of the twelve judicial councils that now exist in the country. This Council consists, unlike its Cameroonian equivalent(s), of the Chief Justice of Canada and the Chief Justices of all the superior courts. It should be noted that judicial councils have also become the principle means of dealing with complaints about Canadian judges who are appointed by provincial or territorial governments.[168]

By section 41 of the Act, a judge's salary can be stopped where he has "become incapacitated or disabled from the due execution of his office." Professor Lederman's argument that the section is unconstitutional,[169] has been held by Professor Hogg to be "convincing". Hogg, nevertheless, doubts that the section has ever been applied and espouses the view that it is merely

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[167] R.S.C. 1970 , c.J-1, sections 39 to 43 (added by R.S.C. 1970 (2nd Supp.) c.16, s.10).

[168] Russell, *supra*, note 7 at 184.

[169] W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 1139 at 1162. The section was amended by R.S.C. 1970 (2d Supp.), c.16, s.10, so that its use must be preceded by a report by the Canadian Judicial Council. Hogg still thinks, however that the new section is nevertheless as constitutionally vulnerable as its predecessor: *Supra*, note 10 at 139-140 n.32.

"a threat to secure the resignation of an allegedly disabled judge."[170] Cameroon's position is better seen under the rubric of "disciplinary sanctions and dismissals".

5.7.8. Disciplinary Sanctions and Dismissals.

As a disciplinary body, the Canadian Judicial Council relies primarily on admonitions and informal conciliation. The only sanction provided for in the *Judges Act*, aside from removal, is termination of a judge's salary,[171] which, as we have just seen, has rarely been used.

A strong tradition of judicial independence and impartiality as obtains in Canada, the United States, and Great Britain is simply not possible in Cameroon where the judiciary is not only under the total control and supervision of the Ministry of Justice, which is itself a department of the executive; but its judges also succumb to annual reports and frequent, indiscriminate and abusive transfers.[172] And these transfers, which are both functional and geographical, are, of course, disciplinary tools in the hands of the Justice Minister and his President.[173]

The ten "sanctions" normally employed in Cameroon, in their ascending order of severity, are: warning, reprimand, cancellation from promotion list, deferment of increment for a maximum period of two years, reduction of one or more incremental positions, removal from his or her post, demotion to a lower group or scale, interdiction for a maximum of six months, dismissal with suspension or loss of pension.[174] By section 46 of those Rules, sanction is imposed for any "disciplinary offence", which the section defines as:

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[170] Hogg, *ibid*

[171] See Russell, *supra*, note 7 at 184.

[172] See Anyangwe, *supra*, note 12 at 36-38.

[173] See *ibid*. at 41-44 for further discussion of this.

> any action which violates the oath taken by the magistrate; any impropriety, breach of honour and dignity; any failure to fulfil the duties and obligations attaching to his rank; any error resulting from personal incompetence.

After showing how these situations mean "serious professional or unbecoming misconduct", Dr. Anyangwe suspects that "there is no reason to suppose that it would not...include certain pronouncements that are highly critical of the regime or the one party system."[175] Those fears and suspicion are not unreasonable. Even the above-cited legislation defining "disciplinary offence" has deliberately left out the disciplinary use of transfers.

The minister's justification of these incessant transfers is just as unconvincing as the president's justification (in Chapter Three) of government non-involvement in the dependent and partial character of the country's mangled judiciary. According to the Honourable Minister of Justice:[176]

> [l]ife generally tends to become boring and uninteresting when it is static. For, it has been said, variety is the spice of life.

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[174] Section 47(1) of *Rules and Regulations of the Judicial and Legal Service*.

[175] *Supra*, note 12 at 16.

[176] Justice Minister's speech in Bamenda on November 25, 1977, quoted in Anyangwe, *ibid*. at 41. Contrast with Chapter Three (Judge Nyo' Wakai's answer beginning note 138).

No one would doubt, however, that it is solely used as a means of cowing courageous judges who must be transferred to the ministry (functional) or to insignificant districts far away from town (geographical[177]). Moreover, if the minister and the president really recognize that variety is the spice of life, one wonders why the government persistently rejects changes that are meant to constantly introduce that much needed variety. Which is to say, genuine democracy means giving effect to the variety to which the people may from time to time aspire. The answer or explanation may be the same as has been given above,[178] namely, that Cameroon is a country where the political cart is deliberately put before the horse; and this is often done by manipulating the process to achieve *desired* results in spite of all the contradiction that this may entail.

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[177] But not cross-cultural as noted in note 91 above.

[178] *Supra*, notes 105 & 156.

CHAPTER SIX

GENERAL CONCLUSION AND RECOMMENDATION

> *"If nothing might be published but what civil authority shall have previously approved, power must always be the standard of truth"*.[1]

The principal purpose of this thesis, "The Judiciary as a State Power in Canada and Cameroon" has been to demonstrate that discussion of the judiciary as a branch of state power is meaningless unless the state in question is *democratic*. This is because only an independent judiciary can be a state power. An independent judiciary simply cannot have a place in a totalitarian state. In democratic polities, the independent judiciary plays a unique role. It decides cases and controversies when the other two branches seek to shortcut the constitutional democratic process.

It has been demonstrated that the judiciary can only successfully accomplish its numerous tasks if it is independent from government generally and from the executive branch, in particular. This requirement is essential for, without it, the adjudication process becomes a farce. The farce is magnified if such a judiciary is spoken of as "a state power". Until a country's judiciary can fully assume its manifold duties, including doing justice between the individual and the state, that country cannot be termed "democratic". To be a state power, therefore, the judiciary *must* be independent and impartial, even when confronted with a case involving the Government.

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[1] Samuel Johnson, *Lives of the English Poets*, quoted in "Preface" in H.C. Donahue, *The Battle to Control Broadcast News: Who Owns the First Amendment?* (Cambridge, Mass.: The MIT Press, 1989) at ix.

A politically active citizenry has been suggested as necessary for securing and maintaining judicial independence. The public must be constantly apprised of the political nature of the court. Only when the public appreciates that the judiciary is a third powerful and indispensable component in the state, playing the role of guardian of both the Constitution and the rights and freedoms of the citizenry,[2] will the public be in a position to vigorously object to any attempts to undermine the judiciary's independence. This thesis has, therefore, unflinchingly called upon the general public, members of other related professions, and the press to support the court in resisting any subversion of its independence and impartiality. We have shown that they must do this if they place any value on their own rights and freedoms. The judiciary alone will not withstand the pressures of the other branches of government.

Apart from an active citizenry and a lively press, we have also shown that federalism and the parliamentary system of government strengthen the judiciary's independence and impartiality as they emphasize non-concentration of state powers. These principles and structures epitomize separation and division of powers. We have, therefore, illustrated that, in the absence of federalism, concentration of state powers in one person is not even possible in the Canadian polity since the country's executive is *bicephal* and the legislature *bicameral*. These, inter alia, are characteristics that further ensure judicial independence and activism. Multiplicity, we have explained, increases the rate and degree of clashes. This, in turn, means the various potential disputants will inevitably recognize and sustain the existence of an arbiter, distinct and unrelated to any of them in any way that its impartiality can be placed in doubt.

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[2] In this, Cameroon, in fact, has been shown to still have a long way to go in view of its majority Napoleonic-Code citizens' perception of its apex court merely as *Cour de cassation*.

As far as the formal or traditional guarantees are concerned, judicial review has been shown to be the greatest single source of the court's prestige, influence and power. We have also demonstrated how this power of review has evolved. First, it was a power used to keep a *federal* legislature from interfering with the jurisdiction of a state or provincial legislature. It then became a device employed in maintaining checks and balances among governmental authorities; and, finally, a power used to protect individuals and groups from the *arbitrary* and *unreasonable* acts of the state. It has been shown that it would have been a miracle for the Cameroonian courts to exercise this power: since the power cannot exist until there is real separation of powers, and not merely the "paper system".

The problems and apparent contradiction inherent in the power of judicial review in a representative democracy have also been canvassed. For example, we have discussed the institution of *un gouvernement des juges*, and of how these practically unelected governing elites are to be held accountable to the public they serve.

We have demonstrated that the power of review can hardly really amount to a government by the judiciary. This is so because, as we have explained, judicial decisions not only require implementation by officials of the other branches, but, in addition, judges have neither the "sword" nor the "purse". Their appointment, remuneration, training, promotion, and the like, have been shown to be generally determined and effected by persons belonging to the other branches. This has been advanced as a (possible) solution to the second difficulty, that of judicial responsibility. We have, consequently, shown this dependency to be both *necessary* and *inevitable*.

But since the other actors on whom judges depend are part of the system of political and social power in the country, this dependency has also been shown to be at odds with the traditional ideology of the liberal state, which insists and emphasizes the neutrality of the judiciary under the rule of law. While demonstrating that ideological myth must confront the reality of an elite recruitment process, a process which has been shown never to be neutral- irrespective of the selection method- it has been submitted that political considerations must not become the *only* criteria. The appointive system, it has been suggested, should be further hedged with devices whereby qualifications for the job also play a significant part. Though politics cannot be totally eliminated, a judge must have no constituency except the unenfranchised lady with the blindfold and scales; no platform except equal and impartial justice under law. This, we have explained, is even much more pressing in a society which claims to be open, because an honest and competent judiciary is vital to any truly free society and successful democracy.

On this issue of judicial independence generally, this thesis has emphasized throughout that everyone in the state must be involved; not just the lawyers, judges, and law teachers, though these are at the top of the list. A system of reasonable checks and balances must be put in place and jealously guarded. Coupled with an active citizenry, four-fifths of the problem would have been overcome. This is the solution that this thesis has sustained throughout. Canada has been found to have little or no problem with the issue not only because Canadians are now politically aware of the role an independent judiciary plays in their polity but, also, because of the country's political system.

It has, therefore, been recommended that the present Cameroonian structure, in its entirety, should be dismantled and replaced with a new one which guarantees the judiciary's independence, impartiality, and influential role in the life of the nation. Cameroonians must do this if they really want to have the rare pleasure of living in an egalitarian, democratic, responsible, and pluralistic society.

It is important to reiterate that no amount of law reform[3] in the present Cameroonian system can solve the problem of judicial dependence and partiality and, thus, provide the required balance, critical to a free society. But should the proposals and recommendations proffered in this thesis be adopted, the prosecution, among other things, would simply cease "to harass and to put the individual to considerable discomfort, embarrassment and expense"[4]; as well as cease to "display arbitrary and inexplicable differences[[5]] in the way that individual cases, or class[es] of cases, are treated in different parts of the country."[6] Only then would "a victim who has reported an offence" not necessarily need to "be allowed to file a formal complaint to the *Procureur Général* after one month if no action has been taken in the matter by the State Counsel".[7] Only then would there be a curb on power "so as to ensure fairness, efficiency, openness and accountability".[8]

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[3] "[T]o get rid of old out-of-date colonial laws; to unify and modernise the law, profitably borrowing from other countries on certain matters and inventing improvements of our own so as to make the law responsive to our national character, culture and social milieu.": C. Anyangwe, *The Cameroonian Judicial System* (Yaoundé: CEPER, 1987) at xiv.

The final recommendation, therefore, is that Cameroon, in order to "flock together" with Canada, must not only abandon its curious brand of democracy, *la démocratie avancée*. It must also convince both constitutional and political pundits that it is in possession of viable state institutions with which to govern its polyethnic populations and insure proper regard for justice and liberty. We have shown that it cannot do this until the judiciary is independent and impartial. And until a judiciary has these attributes, we must keep emphasizing, it cannot be a state power.

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[4] C. Anyangwe, *The Magistracy and the Bar in Cameroon* (Yaoundé: PANAG-CEPER, 1989) at xiii.

[5] No one is here claiming that differences would completely vanish. Differences can never disappear in this matter; but they would cease to be *inexplicable*: because, then, it would be validly done on the distinctness basis which, in the first place, justifies a federation.

[6] Anyangwe, *supra*, note 4 at xiii.

[7] *Ibid* at xii.

[8] *Ibid*. at xiii.

Cameroon, consequently, needs a constitution which indicates in black and white the part that judges are expected to play and which also makes them independent of, and not appended to, the executive branch of government. Above all, Cameroon needs a lively, politically conscious citizenry. Both these are necessary in order to make the balance between the citizen and government a real one, a balance which is critical to a free society.

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